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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MARION EDUCATION ASSOCIATION and
MICHIGAN EDUCATION ASSOCIATION,
Respondents-Labor Organizations,

-and- MERC Case No. CU17 E-016

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

APPEARANCES:

White Schneider P.C., by Jeffrey S. Donahue, for Respondents

Thrun Law Firm, P.C., by Robert G. Huber, for Charging Party

DECISION AND ORDER

On September 11, 2018, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondents, the Marion Education Association and the Michigan Education Association (Unions) and their agents the Marion Education Association's President, Anthony Baldwin, and the Michigan Education Association's UniServ Director, Chad Williams[2], did not violate the duty to bargain under § 10(2)(d) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(d). The ALJ concluded that the decision of Charging Party Marion Public Schools (Employer) to not renew an employee's extracurricular assignment is not a prohibited subject of bargaining, and therefore, Respondents' actions in filing a grievance over the Employer's decision or in advancing that grievance to arbitration is not a breach of the duty to bargain. The ALJ found that the employee was not in employment regulated by the Teachers' Tenure Act, MCL 38.71 –

[1] MAHS Hearing Docket No. 17-009462

[2] We find the ALJ is correct in stating in his Decision and Recommended Order, "With respect to the allegations against Baldwin and Williams individually, Charging Party has not cited, nor am I aware of, any decision in the long history of the Commission in which a union representative has been held personally liable for a violation of Section 10 of the Act. In any event, given that a cease and desist order against the union would necessarily include all officers, agents and representatives, the point is largely moot." Nor do we find any basis in PERA for finding a union representative personally liable for a union's alleged breach of the duty to bargain. In Charging Party's supplemental brief, at footnote 1, Charging Party specifically withdrew all allegations against Tony Baldwin as a Respondent. Moreover, Charging Party's brief on exceptions states, at footnote 2. "The District withdrew that aspect of the ULP charges relating to Baldwin and Williams." In light of those statements by Charging Party, we consider the charges against Baldwin and Williams to be withdrawn and have, therefore, removed their names from the case caption.

38.191, for purposes of § 15(3)(m) of PERA and, therefore, Respondents did not violate §10(2)(d) by challenging the employee's non-renewal as a track coach through the negotiated grievance procedure over Charging Party's objection. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After receiving an extension of time, Charging Party filed its exceptions and a brief in support of the exceptions to the ALJ's Decision and Recommended Order on November 5, 2018. After being granted an extension of time, Respondents jointly filed a brief in support of the ALJ's Decision and Recommended Order on December 14, 2018.

In its exceptions, Charging Party contends that the ALJ erred by finding that: (1) § 15(3)(m) of PERA was not intended to cover persons who qualify as teachers when they are performing coaching duties, (2) by concluding that the Teachers' Tenure Act does not regulate the activities of teachers when serving in Schedule B positions, and (3) by failing to find that Respondent Unions' advancement of the employee's grievance to arbitration violated § 10(2)(d) of PERA and repudiated language in the parties' collective bargaining agreement barring grievances over prohibited subjects of bargaining. The Charging Party further contends that the decision of the ALJ impermissibly disregards established legal authority. Charging Party asserts that said legal authority holds that the Teachers' Tenure Act regulates the tenured teacher rather than the position occupied by the tenured teacher. Finally, Charging Party contends that the ALJ's decision is contrary to the legislative objective in § 15(3)(m) of PERA.

In their brief in support of the ALJ's Decision and Recommended Order, Respondents contend that the ALJ properly construed § 15(3)(m) of PERA to determine that it did not apply to positions that are not regulated by the Teachers' Tenure Act.

Upon reviewing the record and the exceptions filed by Charging Party, we find the exceptions to be without merit.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. The facts in this case are not materially in dispute. A member of the bargaining unit represented by Respondents was employed by Charging Party as a tenured teacher. He also had a part-time assignment as a track coach. The position as track coach was under a separate contract, and compensation for work as a track coach was calculated separately. This kind of arrangement was addressed by Schedule B of the parties' collective bargaining agreement. After an incident during a track meet, Charging Party decided not to renew the track coach's annual contract. Respondents grieved Charging Party's decision. Charging Party contended that the matter involved a prohibited subject of bargaining under § 15(3)(m) of PERA and, therefore, was not subject to the grievance process under the parties' collective bargaining agreement, as that agreement provided that prohibited subjects of bargaining cannot be grieved. Respondents then sought to arbitrate the grievance. Charging Party filed the charge in this matter alleging that Respondents violated their duty to bargain by attempting to take a dispute over a prohibited subject of bargaining to arbitration and that Respondents repudiated the parties' collective bargaining agreement by filing a grievance over a prohibited subject of bargaining.

Discussion and Conclusions of Law:

As the ALJ explained, § 15(3)(m) of PERA was enacted as part of a group of amendments to § 15(3) of PERA in 2011 and became effective July 19, 2011. As explained more thoroughly in the ALJ's decision, these amendments removed several issues from the scope of collective bargaining between public school employers and the unions representing certain classifications of public school employees. As noted by the ALJ, in the last few years, this Commission and Michigan appellate courts have reviewed numerous cases in which public school employers and unions representing public school employees disputed whether particular issues were prohibited subjects of bargaining, and the extent to which the bargaining prohibition limits the filing of grievances or grievance arbitration. See, *Calhoun Intermediate Ed Ass'n, MEA/NEA,* 28 MPER 26 (2014), aff'd *Calhoun Intermediate Ed Ass'n, MEA/NEA v Calhoun Intermediate School District,* 314 Mich App 41 (2016); *Ionia Ed Ass'n*, 27 MPER 55 (2014), aff'd *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479 (2015); *Michigan Ed Ass'n,* 30 MPER 62 (2017), aff'd *Michigan Ed Ass'n v Vassar Pub Sch,* unpublished opinion per curiam of the Court of Appeals, issued May 22, 2018 (Docket No. 337899); *Ionia Co Intermediate Ed Ass'n, MEA/NEA,* 30 MPER 18 (2016), aff'd *Ionia Co Intermediate Ed Ass'n, MEA/NEA v Ionia Co Intermediate Sch Dist,* unpublished opinion per curiam of the Court of Appeals, issued February 22, 2018, (Docket No. 334573); *Ionia Pub Sch*, 28 MPER 58 (2014), aff'd *Ionia Pub Sch v Ionia Ed Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2016 (Docket No. 325413); *Pontiac Sch Dist*, 27 MPER 52 (2014) (*Pontiac Sch Dist I)* aff'd *Pontiac Sch Dist v Pontiac Ed Ass'n,* unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015, (Docket No. 321221); *Pontiac Sch Dist,* 27 MPER 60 (2014) (*Pontiac Sch Dist II)*; aff'd *Pontiac Sch Dist v Pontiac Ed Ass'n,* unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015, (Docket No. 322184); 31 MPER 40; *Shiawassee Intermediate Sch Dist Ed Ass'n,* 30 MPER 13 (2016)*Pontiac Ed Ass'n MEA/NEA,* 28 MPER 56 (2014); *Pontiac Sch Dist*, 28 MPER 34 (2014) (*Pontiac Sch Dist III)*; *Pontiac Sch Dist*, 28 MPER 1 (2014) (*Pontiac Sch Dist IV).*

This Commission first examined the question of whether filing a grievance over a prohibited subject or taking a grievance over prohibited subject to arbitration is a violation of the duty to bargain in *Pontiac Sch Dist III.* In that case, we explained:

> Prohibited subjects can never become an enforceable part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). . . .[B]y taking the grievance . . . to arbitration, the Union was attempting to enforce provisions in the expired collective bargaining agreement that . . . had become prohibited subjects of bargaining.
>
> Although the parties may discuss a prohibited subject of bargaining, neither party may insist on carrying that discussion beyond the limits set by the other party. . . . In this matter, the Union's actions in advancing the Lieberman grievance to arbitration are analogous to insistence on negotiating over prohibited subjects of bargaining when the other party has repeatedly refused to negotiate those matters, as in *Calhoun.* Here the Union was attempting to use the arbitration process to force the Employer to go beyond the discussion stage of the grievance process to unlawfully enforce contract provisions and/or past practices made unenforceable by § 15(3)(j) of PERA.

From that point on, we have made it clear that filing a grievance over prohibited subjects of bargaining is not a breach of the duty to bargain. The filing of a grievance provides the parties with the opportunity to discuss the issue and, perhaps, reach a settlement. We want to encourage such discussions to the extent that the parties are willing to engage in them. However, seeking to arbitrate a grievance over a prohibited subject of bargaining is a breach of the duty to bargain.

In this matter, the Employer has indicated that it is not willing to accept grievances over prohibited subjects of bargaining, and the parties have incorporated language in their collective bargaining agreement prohibiting the filing of such grievances. Therefore, if the Employer's decision to not renew the track coach's contract is a prohibited subject of bargaining, the Unions' grievance on that matter may be a violation of that contract provision, and the Unions' attempt to arbitrate the issue is a breach of the duty to bargain. However, there is no breach of the duty to bargain if the nonrenewal of the track coach's contract is not a prohibited subject of bargaining.

The essence of Charging Party's exceptions is that the ALJ erred by finding that § 15(3)(m) of PERA does not cover persons who qualify as teachers, when the discipline at issue affects employment in an annual assignment of extra duty for extra pay. § 15(3)(m) of PERA provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> (m) For *public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191*, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101 (emphasis added).

Thus, the issue before us is whether the track coach's employment is regulated by the Teachers' Tenure Act, MCL 38.71 to 38.191. We specifically addressed the applicability of §15(3)(m) in cases dealing with discipline of teachers in their employment as teachers in *Michigan Ed Ass'n; Ionia Co Intermediate Ed Ass'n, MEA/NEA*; and *Shiawassee Intermediate Sch Dist Ed Ass'n.*

However, in those three cases, there was no issue as to whether the discipline addressed under §15(3)(m) applied to the teachers' employment as teachers. In the case before us, the question is whether the discipline of the track coach is governed by §15(3)(m) and, more specifically, whether the track coach's employment is regulated by the Teachers' Tenure Act.

As the ALJ recognized, the goal in construing the language of § 15(3)(m) of PERA is to effectuate the Legislature's intent as inferred from the wording of the statute. See, *Krohn v Home-*

Owners Ins Co, 490 Mich 145, 156-157 (2011); *Casco Twp v Sec'y of State,* 472 Mich 566, 571, (2005); *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748 (2002). The most reliable evidence of the Act's intent is the statute's wording. *Neal v Wilkes*, 470 Mich 661, 665 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). Each word of a statute should be given meaning, and no word should be treated as surplusage. *Apsey v Mem'l Hosp*, 477 Mich 120, 127 (2007); *Baker v Gen Motors Corp,* 409 Mich 639, 665 (1980).

The language of §15(3)(m) specifically addresses the type of employment to which it applies when it states: "For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191." As the ALJ notes, other provisions of §15 of PERA do not limit their applicability to specific categories of public school employees as §15(3)(m) does. The ALJ goes through a very thorough analysis of the wording of §15(3)(m) and its legislative history. We agree with the ALJ that the inclusion of the language "whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191" gives a clear indication of the Legislature's intent to limit the applicability of §15(3)(m) to employment that is regulated by the Teachers' Tenure Act. We agree with that analysis and adopt it as though fully rewritten herein.

As discussed by the ALJ, the track coach was employed in two separate capacities, as a math teacher and as an extracurricular track coach. There is no dispute that his employment as a math teacher is regulated by the Teachers' Tenure Act, MCL 38.71 to 38.191. However, the subject of the parties' dispute is whether his employment as a track coach is regulated by the Teachers' Tenure Act. The ALJ examined numerous decisions by the State Tenure Commission regarding teacher discipline. We agree with his conclusion, for the reasons stated in his decision, that the State Tenure Commission has no jurisdiction over discipline regarding annual assignments of extra duty for extra pay, such as the work performed by the employee in this case in his capacity as a track coach. The work he performed in his employment as a track coach is not regulated by the Teachers' Tenure Act.

Charging Party takes issue with the ALJ's analysis and asserts that the ALJ ignored two State Tenure Commission decisions that Charging Party contends support its position, *Green v Hazel Park Community Sch*, STC No. 01-22, issued November 22, 2002, and *Fuller v Detroit Bd of Ed*, STC No. 94-36, issued May 24, 1995. As the ALJ explained on page 15 of his decision, both of those cases are distinguishable from the matter herein. In each of those two cases, the teacher in question was being disciplined in their employment as a teacher. While the State Tenure Commission considered misconduct alleged to have been committed by those teachers during extracurricular assignments, the discipline was directed at their employment as teachers. The same is true with respect to the other cases cited by Charging Party in its brief on exceptions. In the course of reviewing the discipline of teachers, the State Tenure Commission has considered alleged misconduct committed by teachers when they were off duty or when they were engaged in extracurricular assignments. As Charging Party asserts, the State Tenure Commission may consider alleged misconduct by a teacher that occurs outside of the individual's role as a teacher in reviewing discipline of the teacher in their employment as a teacher. This case is distinguishable from the cases cited by Charging Party because the Employer is not disciplining the track coach in his employment as a teacher; he is being disciplined in his employment as a track coach, which is not regulated by the Teachers' Tenure Act.

The Teachers' Tenure Act, which controls the requirements for teachers to earn or lose tenure specifically provides at § 1(8), "Continuing tenure does not apply to an annual assignment of extra duty for extra pay." Therefore, continuing tenure cannot apply to the track coach's extracurricular position. Accordingly, we find that §15(3)(m) of PERA does not apply to the nonrenewal of the track coach's employment.

For the reasons stated above and those stated in the ALJ's decision, we find that Respondent did not breach its duty to bargain by attempting to arbitrate the grievance over the nonrenewal of the track coach's annual contract. We agree with the ALJ's decision and his recommendation that the charge be dismissed.

We have carefully examined all other issues raised by the parties and find they would not change the result. Accordingly, we affirm the ALJ's decision and adopt his recommended order.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: SEP 16 2019

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

Case No. CU17 E-016
Docket No. 17-009462-MERC

MARION EDUCATION ASSOCIATION and
MICHIGAN EDUCATION ASSOCIATION,
Respondents-Labor Organizations,

-and-

ANTHONY BALDWIN and CHAD WILLIAMS,
Individual Respondents,

-and-

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

APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue, for Respondents

Thrun Law Firm, P.C., by Robert G. Huber, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed on May 2, 2017, by Marion Public Schools against the Marion Education Association and its President, Anthony Baldwin, and the Michigan Education Association and its UniServ Director, Chad Williams. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission).

The Unfair Labor Practice Charge:

This case presents the novel issue of whether a public school employer's decision to discipline a certified teacher for conduct arising from his employment as an athletics coach constitutes a prohibited subject of bargaining under PERA. The charge alleges that Respondents violated Section 10(2)(d) of the Act by filing a grievance over the school district's decision not

to renew Timothy Michell as coach of the boys' varsity track team and by advancing that grievance to arbitration over Charging Party's objection. The district contends that Michell's employment was regulated by the teacher tenure act (TTA), MCL 38.71 *et seq.* and, therefore, the grievance filed by Respondents over the non-renewal of Michell's coaching position pertains to teacher discipline which is a prohibited subject of bargaining under Section 15(3)(m) of the Act.

On August 23, 2017, Charging Party filed a motion for summary disposition, asserting that there are no material disputes of fact and that the school district is entitled to judgment as a matter of law. Respondents filed a reply to the district's motion on September 18, 2017. At the request of the parties, oral argument was held before the undersigned in Detroit, Michigan, on December 7, 2017. Following that hearing, the parties expressed their intent to file supplemental briefs to address various issues raised during the oral argument. The school district filed its supplemental brief on April 3, 2018. Respondents filed their supplemental brief on May 4, 2018.

Findings of Fact:

The Marion Education Association (Marion EA), an affiliate of the Michigan Education Association (MEA), is the sole and exclusive bargaining representative for a unit consisting of all certified teaching personnel employed by the Marion Public Schools (Charging Party or the school district), whether under contract or on leave, excluding administrative and executive personnel. The collective bargaining agreement currently in effect between the school district and the Marion EA covers the period August 21, 2015, through August 20, 2018. Article 3 of the contract is entitled "Teacher Rights." Article 3, Section G of the agreement states, "No teacher shall be reprimanded, disciplined, discharged, reduced in compensation, or deprived of any professional and/or contractual advantage for reasons that are arbitrary and or capricious."

The collective bargaining agreement contains a multi-step grievance procedure which is set forth in Article III. The grievance procedure culminates in final and binding arbitration before an arbitrator selected by agreement of the parties or appointed by the American Arbitration Association (AAA). Article 11, Section A of the contract defines a grievance as "an alleged violation of a specific term of this Agreement, or misinterpretation of any provision of the Agreement, or the unfair application of any policy or regulation of the Board directly related to teaching terms and conditions." Pursuant to Article 11, Section B of the agreement, "[A]ny matter involving a prohibited subject of bargaining" may not be the basis of any grievance filed under the procedure set forth in the contract.

Schedule B of the contract sets forth the compensation for various assignments which are not part of a teacher's regular responsibilities, including coaching, music, yearbook, National Honor Society and other extracurricular activities. Any individual assigned to a Schedule B position is required to sign a separate employment contract with the district. Although each of these Schedule B contracts have one-year terms, it was the practice of the district at the time of this dispute to simply continue individuals in their Schedule B assignments from year to year without board action and without requiring individual employees to enter into new one-year agreements. An individual is not required to be a member of the bargaining unit in order to occupy a Schedule B position with the school district. The contract states, "Schedule B positions

shall be posted internally prior to posting for outside applicants. First consideration will be given to Bargaining Unit members."

At the time of the events giving rise to this charge, Timothy Michell, a tenured, certificated teacher, was employed by Charging Party to teach math. He also worked for the school district for several years as a boys' varsity high school track coach, an assignment for which a teaching certificate is not required. Michell's employment as boys' varsity track coach was governed by a one-year contract which was entered into on March 24, 2016. Pursuant to that agreement, Michell was to be paid a total of $2,596.01 for the track season. Pay dates were April 15, May 13, and the end of the season. Michell's Schedule B contract, which was titled, "Athletic Contract – Marion Public Schools" also contained the following language:

> *It is agreed that tenure is not allowed in an extra-duty assignment.* Positions will be filled by appointment on an annual basis. Appointments shall be made by an administrator with the Board of Education's approval. It is further agreed that the initiation of an extra-curricular activity, or continuation of the same, rest with the authority of the administrator. If the above activity is terminated for any reason before completion, the above pay will be prorated accordingly. [Emphasis supplied.]

As boys' varsity track coach, Michell was responsible for supervising and directing activities during track meets. During a track meet in May of 2016, a student allegedly collapsed on the track and required urgent medical attention. According to Charging Party, Michell was not on the scene at the time of the incident and could not be located for a period of approximately fifteen minutes. The school district contends that when Michell was finally found, he had no knowledge of what had transpired. As a result of the incident, John Russell, the principal of the school to which Michell was assigned, decided not to recommend Michell for a coaching assignment for the following school year. Michell was paid the balance of his Schedule B contract and he was not disciplined in his role as teacher.[1]

On August 2, 2016, Michell filed a grievance asserting that he had been terminated from his coaching position without cause and that the principal's decision was "arbitrary and potentially capricious." The grievance asserted that the school district's actions constituted a violation of Article 3, Section G of the collective bargaining agreement. As a remedy for the alleged contract breach, Michell requested that his position as boys' varsity track coach be restored "until such time that the administration has policies and procedures in place to make schedule B coaching positions based upon fair and non-arbitrary basis." The school district did not respond to the grievance at Level 1 of the contractual grievance procedure.

On August 29, 2016, the Union advanced the grievance to Level Two, which calls for submission of the matter to the office of the superintendent. Upon receipt of the grievance, Mort Meier, Superintendent of Marion Public Schools, contacted Marion EA President Anthony Baldwin and informed him that it was Respondent's position that the grievance related to a

[1] Subsequent to these events, Michell was laid off as a math teacher. That action was unrelated to the instant dispute.

prohibited subject of bargaining. On October 6, 2016, MEA UniServ Director Chad Williams attempted to move the matter to Level Three of the grievance procedure by seeking a hearing before the district's Board of Education (Board). In response, Meier wrote Williams the following letter, issued October 11, 2016:

> This is in reference to your October 6, 2016 filing of a grievance protesting the termination of Tim Michell from his coaching duties as being without just cause.
>
> Section 15(3)(m) of the Public Employment Relations Act provides that teacher discipline is a prohibited subject of bargaining. Furthermore, the contractual grievance procedure clearly specifies that grievances involving prohibited subjects of bargaining are excluded from the grievance procedure. Since the contract expressly states that the subject grievance is excluded from the contractual grievance procedure, it logically follows that the District has no duty to process or otherwise act upon that grievance. For this reason, I am declining to present that grievance to the Board of Education for its consideration because it is outside the scope of matters appropriate for consideration by the Board.
>
> You should further be advised that in *Fuller v Detroit Board of Educ*, STC 34-36, the State Tenure Commission held that the tenured teacher could be disciplined for activities occurring while functioning as a coach. Furthermore, in *Pontiac School District and Pontiac Educ Assn*, 28 MPER 34 (2014) MERC held that it is an unfair labor practice to advance a grievance concerning a prohibited subject of bargaining to arbitration. You may anticipate, Mr. Williams, that should you elect to file this claim to arbitration, this is an option that would be considered by the Board of Education. I trust that this is responsive to your inquiry.

On January 13, 2017, Williams wrote to Monica Cox, President of the Marion Board of Education, and requested that the Board schedule a hearing on two pending grievances, one of which was the grievance pertaining to Michell's coaching position. The letter stated, in pertinent part:

> The arguments offered by Superintendent Meier notwithstanding, both Article 5 -- Level 2 of the Marion ESP contract and Article 11 -- Level 3 of the Marion EA contract requires a board hearing to be scheduled so that the Board may consider arguments and merit of the aforementioned grievances and provide their disposition. The Association finds no means permitting the Superintendent to abrogate contractual procedures at will, particularly given that the Association disagrees with the legal basis for any such rejections. This matter is most properly disposed of by a hearing of the Board.
>
> The Association is uncertain as to whether the full Board was aware of these filings, and the Association has found no evidence that the Board took any official action on these matters. Consequently, the Association formally reasserts its request that a motion be made in open session for the Board to take up and

consider the above properly filed grievances by scheduling a hearing date(s) as required by the contract.

On or about March 1, 2017, Williams advanced the Michell grievance to Level Four of the grievance procedure by filing for arbitration with AAA. Thereafter, Charging Party's attorney, Robert Huber, notified both AAA and the Union's representative in the arbitration proceeding of the school district's position that the grievance is not arbitrable because it involves a prohibited subject of bargaining under PERA. As a result, the arbitration has been stayed pending resolution of the instant unfair labor practice charge.

Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. In Public Act 112 of 1994, the Legislature amended Section 15 of PERA to give public school employers, as defined by Section 1(h) of the Act, extraordinary discretion in managing and directing its operations. PA 112 significantly narrowed the scope of bargainable issues by making certain decisions prohibited subjects of bargaining, including the school year starting day, the policyholder of employee group insurance benefits, the use of volunteers and pilot programs, and the decision whether or not to contract with a third party for one or more noninstructional support services. Although the amendment did not define the term "prohibited subject," the Court of Appeals concluded that the Legislature's intent was to foreclose the possibility that a school district could be found to have committed an unfair labor practice by refusing to bargain over a prohibited topic or that a prohibited topic could become part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996). Thus, PA 112 essentially created an exception to the general rule requiring a public employer to bargain over terms and conditions of employment. Because grievance arbitration is an extension of the collective bargaining process, a labor organization representing public school employees violates Section 10(2)(d) of PERA by seeking arbitration of a grievance pertaining to a prohibited subject of bargaining. *Pontiac Sch Dist*, 28 MERC Lab Op 34 (2014); *Shiawassee ISD*, 30 MERC Lab Op 13 (2017).

The Legislature added to the list of prohibited subjects of bargaining in 2009 and then again in 2011 with the passage of Public Act 103.[2] Effective July 19, 2011, PA 103 prohibits public school employers and representatives of their employees from bargaining over a wide

[2] PA 103 was part of a tie-barred package of legislation passed in 2011 which significantly impacted the terms and conditions of employment for public school employees. In addition to PA 103, the Legislature enacted Public Acts 100 and 101 of 2011, which amended several sections of the TTA. Among the various amendments was the introduction of language allowing a teacher on continuing tenure to be discharged or demoted for a reason that is not arbitrary and capricious, rather than for reasonable or just cause. MCL 38.101. 2011 PA 102 amended the Revised School Code (RSC), MCL 380.1 *et seq.*, which is a separate and distinct body of law governing "the regulation of school teachers and certain other school employees." See *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 526 (2015). The 2011 changes to the RSC included the introduction of provisions allowing for the dismissal of teachers who have been rated ineffective.

range of topics, including decisions regarding the placement of teachers, which teachers should be laid off or retained in the event of a reduction in force, the recall of teachers following a reduction in force, and the public school employer's performance evaluation system, classroom evaluations and parental notification of ineffective teachers. The 2011 amendments to PERA also included the addition of Section 15(3)(m), which made the following a prohibited subject of bargaining:

> For public employees whose employment is regulated by [the TTA], decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by [the TTA], a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under [the TTA].

Section 15(3)(m) of PERA must be read in conjunction with Section 15(4), which states, "Except as otherwise provided in Section (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees and, for the purposes of this act, are within the sole authority of the public school employer to decide." (Emphasis added.) See *Ionia County Intermediate Ed Ass'n*, 30 MPER 18 (2016).

Following the passage of the 2011 amendments to PERA, the Commission and the Courts have been called upon repeatedly to determine the meaning and scope of these new prohibitions on collective bargaining between public school employers and school unions, including the extent to which Section 15(3)(m) limits or precludes bargaining over disciplinary decisions involving teachers. In *Shiawassee ISD*, *supra*, the employer filed an unfair labor practice charge alleging that the union violated its duty to bargain in good faith by insisting on arbitrating a grievance challenging a disciplinary suspension issued to a member of the union's bargaining unit. The employer argued that Section 15(3)(m) is so broadly written that it renders teacher discipline and anything related to it a prohibited subject of bargaining. While conceding that teacher discipline is a prohibited subject of bargaining under Section 15(3)(m), the union asserted that the grievance was nevertheless arbitrable because the discipline itself was not actually the subject of the grievance. Rather, the union asserted that the subject of the grievance was actually the school district's breach of contractual provisions incorporating various statutory and constitutional rights, including procedural due process rights. The Commission rejected that argument, concluding instead that contract provisions incorporating statutory or constitutional rights are themselves prohibited subjects of bargaining and unenforceable under Section 15(3)(m) to the extent that they concern decisions by public school employers which relate to teacher discipline or discharge.

The Commission also rejected the Union's attempt to rely on Section 15(3)(j) to support its claim that the grievance was arbitrable. Section 15(3)(j) prohibits bargaining over "[a]ny decision made by a public school employer regarding the placement of teachers, or the impact of

that decision on an individual employee or the bargaining unit." The union asserted that the exclusion of the phrase "any decision" in Section 15(3)(m) established the legislative intent that the prohibition on bargaining did not extend to "all decisions," but only to those specifically listed within subsection (m). The Commission disagreed, finding that the prohibition on bargaining over teacher discipline was sufficiently broad to include the employer's decision regarding the procedures it chose to use or to forgo in its discipline of the teacher:

> Although Section 15(3)(m) does not say that it prohibits bargaining over "any decision," the list of decisions over which bargaining is prohibited is extensive. As the ALJ noted, "the Legislature, in listing the subjects made prohibited bargaining topics by Section 15(3)(m), prohibited bargaining over the 'content, standards, procedures . . . of a policy regarding discharge or discipline of an employee.' Webster's Unabridged Dictionary, 2nd edition (1987), defines 'content as "something that is contained in," or the subjects or topics covered in a book or document.' Moreover, the bargaining prohibition applies to 'procedures . . . and implementation of a policy regarding discharge or discipline of an employee.' The Merriam-Webster online dictionary defines "procedures" as a "particular way of accomplishing something or acting." Thus, we can interpret Section 15(3)(m) as prohibiting bargaining over procedures, or a particular way of accomplishing discipline or discharge as contained in a public school employer's policy. The language of Section 15(3)(m) also prohibits bargaining over "decisions 'concerning' the discharge or discipline of an individual employee." The Merriam-Webster online dictionary defines concerning as "relating to" or "regarding." Full examination of the language contained in Section 15(3)(m) extends not only to decisions to discharge or discipline particular employees, but also substantive or procedural decisions related to discharge or discipline of individual employees and decisions regarding the procedures set forth in an employer's policy regarding discipline or discharge. Therefore, we cannot say that the result in this matter would differ significantly if the Legislature had changed the language of Section 15(3)(m) in a manner comparable to the change made in Section 15(3)(j) and prohibited bargaining over "any decision made by the public school employer regarding the [discipline or discharge] of teachers, or the impact of that decision on an individual employee of the bargaining unit. We find nothing in the language of Section 15(3)(m) to indicate that its applicability is limited to decisions on whether an individual employee should be disciplined or discharged.
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> To the extent that the Union sought to use arbitration to enforce provisions in the Parties' collective bargaining agreement or the Employer's board policies that the Union contends were not applied properly with respect to the procedure the Employer used in disciplining Creech, the Union was attempting to use arbitration to enforce provisions covering prohibited subjects of bargaining. In this case, as in *Pontiac Sch Dist*, 28 MERC Lab Op 34 (2014), the Union went beyond the discussion stage of the grievance by attempting to use the arbitration process to enforce contract provisions that apply to prohibited subjects of bargaining. By so doing, the Union has violated Section 10(2)(d) of PERA.

A similar issue was raised in *Howell Ed Ass'n*, 30 MPER 29 (2016). Howell involved a charge alleging that the union violated Section 10(2)(d) of PERA by filing a grievance challenging an unpaid suspension issued to a teacher in its bargaining unit and by filing a demand to arbitrate the grievance. As in *Shiawassee*, the union argued that the grievance was lawful because it sought to enforce contractual due process rights and pre-disciplinary procedural rights. In addition, the union asserted that Section 15(3)(m) did not apply because the grievance, as amended, included an allegation that the employer failed to comply with the contractual grievance procedure in processing the grievance. The ALJ held that the contractual provisions relied upon by the union were unenforceable to the extent that they require a public school employer to discuss prohibited subjects of bargaining, such as teacher discipline, with the bargaining representative. In so holding, the ALJ cited Section 15(4) of PERA, which states that matters made prohibited subject of bargaining under the Act are "within the sole authority of the public employer to decide." Accordingly, the ALJ concluded that the union violated its duty to bargain in good faith by demanding that the employer arbitrate the grievance pertaining to teacher discipline. When no exceptions were filed, the ALJ's decision was adopted as the final decision of the Commission.

In *Ionia County Intermediate Ed Ass'n,* 30 MPER 18 (2016), the employer issued a written reprimand to a probationary special education teacher based upon an allegation that she allowed male and female students to change clothes in the same locker room. The union filed a grievance asserting that the discipline violated Article 20, Section 1, of the collective bargaining agreement which prohibited the employer from disciplining or discharging an employee "arbitrarily or capriciously." In addition, the union asserted that the grievance violated the teacher's due process rights. As a remedy, the union requested that the discipline be reduced to a verbal warning. After the school district denied the grievance on the ground that teacher discipline was a prohibited subject of bargaining under Section 15(3)(m) of PERA, the union filed for arbitration. The Commission found that the union violated Section 10(2)(d) of PERA by filing the grievance and seeking to have it arbitrated and the Court of Appeals agreed. *Ionia County Intermediate Ed Ass'n v Ionia County ISD,* unpublished opinion per curiam of the Court of Appeals (Docket No. 334573), issued February 22, 2018. The Court held that Section 15(3)(m) of the Act "clearly and plainly prohibits – through the words 'shall not include' – collective bargaining regarding 'decisions concerning the discharge or discipline of an individual employee." For that reason, the Court found that the contract's prohibition on arbitrary or capricious disciplinary decisions was unenforceable. In addition, it rejected the union's contention that individual disciplinary decisions may be challenged as "arbitrary and capricious" because that standard is referenced in the second sentence of Section 15(3)(m). According to the Court, the arbitrary and capricious standard mentioned in the second sentence applies to a public school employer's "adoption, implementation or maintenance of *policies* – not to disciplinary decisions with respect to individual teachers." (Emphasis in original). Lastly, the Court agreed with the Commission's finding that due process issues relating to teacher disciplinary procedures have likewise been removed from the sphere of collective bargaining. See also *MEA v Vassar Public Schools*, unpublished opinion per curiam of the Court of Appeals (Docket No. 337899), issued May 22, 2018.

Based upon the clear language of Section 15(3)(m) and the cases interpreting that statutory provision, it is evident that the Legislature intended to give a public school employer such as Marion Public Schools broad authority to implement disciplinary procedures and to discipline or discharge individual employees without having to engage in bargaining with the representative of its employees as would otherwise be required under Section 15 of PERA. All of the above cases, however, involved the discipline of individuals arising in the context of their employment as teachers. The disciplinary action which is the subject of this charge occurred as a result of Michell's conduct while working for Charging Party as a boys' varsity track coach. Moreover, the discipline which was imposed by the school district in this matter related specifically to Michell's employment in that extra-duty, Schedule B assignment. Notably, Michell's employment as a math teacher was not the subject of any disciplinary action by the district. Nevertheless, Charging Party contends that the Union violated Section 10(2)(d) of PERA by seeking to arbitrate the grievance involving Michell. According to Charging Party, Section 15(3)(m) applies as long as the individual who is the subject of the grievance is employed by the school district in a position for which certification is required.

In considering the Employer's argument, the primary goal must be, as it is in all matters of statutory construction, to ascertain and effectuate the intent of the Legislature. *Lakeview Community Sch*, 25 MPER 37 (2011), aff'd 302 Mich App 600 (2013); *Casco Twp v Secretary of State*, 472 Mich 566, 571 (2005); *Tryc v Michigan Veterans' Facility*, 451 Mich 129 (1996). The starting point is to review the statute's wording, which provides the most reliable evidence of the Act's intent. *Neal v Wilkes*, 470 Mich 661, 665 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). We must presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory. *Helder v North Pointe Ins Co*, 234 Mich App 500, 504 (1999). Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *Western Mich Univ Bd of Control v State*, 455 Mich 531, 538-539 (1997); *Bingham v American Screw Products Co*, 398 Mich 546, 563 (1976). When statutory language is unambiguous, we must presume that the Legislature "intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hosp*, 461 Mich 394 (2000). When the Legislature includes language in one part of a statute that it omits in another, we make the logical assumption that the omission was intentional. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210 (1993); *People v Peltola*, 489 Mich 174, 185 (2011).

As noted above, Section 15 of PERA made various topics prohibited subjects of bargaining between a public school employer and its employees. Many of the subsections of MCL 423.215 do not delineate between the types of public school employees to whom the prohibition on bargaining applies. For example, Section 15(3)(a) of the Act prohibits bargaining over "[w]ho is or will be the policyholder of an employee group insurance benefit," while Section 15(3)(g) prohibits bargaining regarding the use of volunteers in providing "services" at schools. Other provisions contain language specifically limiting the scope of the prohibition to individuals employed in certain positions or types of jobs. For example, Section 15(3)(f) of PERA prohibits bargaining over the subcontracting of "noninstructional support services" whereas Section 15(3)(j) applies only to decisions made by a public school employer regarding "teacher placement," thus excluding all non-instructional employees from the scope of the

provision. Likewise, the Legislature limited the reach of Section 15(3)(m) to a narrow class of employees. Section 15(3)(m) has two operative sentences, both of which are prefaced by language limiting the applicability of the prohibition on bargaining to "public employees whose employment is regulated by [the TTA.]" Notably, the Legislature did not simply use the word "teacher" as it did in Subsection 15(3)(j), nor did it specify that the prohibition on bargaining over discipline applied to all certificated public school employees, regardless of the specific duties and responsibilities to which they have been assigned, which it presumably would have done had it intended for the result advocated by the school district in this matter. By its terms, the language of Section 15(3)(m) indicates that when considering whether a public school employer is prohibited from bargaining a decision pertaining to discipline, the focus must be on whether the discipline impacts an individual in connection with his or her employment in a position regulated by the TTA.

Such an interpretation is consistent with the legislative history of the 2011 amendments to PERA. When Section 15(3)(m) was first introduced in the House on May 10, 2011, as House Bill 4628, there was no language limiting application of the prohibition on bargaining over discipline to certain types of employees. Rather, House Bill 4628 provided:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects.
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> (m) Decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. A public school employer shall not adopt, implement or maintain a policy for discharge or discipline that is different than the arbitrary and caprcious standard provided in Section 1 of [the TTA].

Based on this language, a public school employer's decisions regarding discipline would have applied equally to all employees of the school district, including certificated teachers, individuals whose application for a teaching certificate has not yet been confirmed or rejected by the Department of Education, administrators, noninstructional support employees, including bus drivers and cooks, and, of course, individuals assigned to extracurricular activities.

When the legislation was passed by the House on June 9, 2011, the scope of the proposed amendment was significantly narrowed. The prohibition on bargaining over discipline no longer applied to all employees of a public school employer. Rather, the House-passed version stated:

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

(m) *For public employees who are teachers as defined in Section 1 of [the TTA]*, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. *For public employees who are teachers as defined in Section 1 of [the TTA]*, a public school employer shall not adopt, implement or maintain a policy for discharge or discipline that is different than the arbitrary and capricious standard provided in Section 1 of [the TTA]. [Emphasis supplied.]

As noted, Respondent asserts that Section 15(3) applies to all certificated teachers employed by a school district, regardless of whether the discipline relates to their employment as a teacher. Such an interpretation would certainly have been a reasonable one based upon the version of the bill as passed by the House. Although the language of the House-passed bill was narrower than the version of the bill as first introduced, the prohibition on bargaining a public employer's decision to discipline an individual employee would nevertheless have still applied to Michell, as he was in fact a teacher as defined by the TTA at the time of the incident. Section 1(1) of the TTA, MCL 38.781(1), provides, "The term 'teacher' as used in this act means a certificated individual employed for a full year by any board of education or controlling board."

However, when the Senate passed its substitute for House Bill 4628 on May 10, 2011, it contained the language which was ultimately enacted as part of PA 103. Rather than applying to all teachers as defined under the TTA, the language the Legislature adopted in Section 15(3)(m) prohibits bargaining over discipline only with respect to public employees "whose employment is regulated by [the TTA]." The fact that the Legislature elected to use that specific and somewhat unusual phrase leads to the inevitable conclusion that the amendment was not intended to cover all individuals who hold a teaching certificate or who otherwise qualify as "teachers" for purposes of the TTA. Rather, when making the determination as to whether Section 15(3)(m) applies to a particular public school employee, the focus must be on whether that individual would have a claim to his or her employment under the TTA which is within the jurisdiction of the State Tenure Commission (STC). Thus, we must focus on whether the TTA regulates the specific duty or task to which that individual has been assigned in order to determine whether Section 15(3)(m) of PERA is operable.

In the instant case, the undisputed facts establish that Michell was employed by Charging Party in two separate capacities. At the time of the incident giving rise to the charge, Michell was a tenured, certificated teacher who had been employed by Marion Public Schools for many years as a math teacher. In that capacity, the terms and conditions of his employment were governed by the collective bargaining agreement entered into between the school district and Respondent covering the unit. Michell also worked for some time as a boys' varsity track coach, an extra-duty position for which a teaching certificate is not required. Although the most recent contract between the parties contains language listing the various athletic and other extra-duty positions and specifying the compensation for those assignments, the terms of employment for such positions are set forth in separate employment contracts which all individuals holding Schedule B positions, including Michell, are required to sign. In fact, the school district may hire an individual for a Schedule B position who is not even a member of the teachers' bargaining unit.

For these reasons, I conclude that Michell's employment as a boys' varsity track coach was separate and distinct from his employment as a math teacher and it is the former which must be considered when determining whether Michell is a public employee "whose employment is regulated by [the TTA]" for purposes of Section 15(3)(m).

Article IV of the TTA, MCL 38.101, sets forth the grounds upon which a tenured teacher can be discharged or demoted. Prior to 1963, the STC treated a school board's refusal to continue a teacher's extracurricular coaching assignment as a demotion for purposes of the TTA. See *Noland v School District of the City of Lincoln Park* (62-3), in which the STC held that a teacher who was relieved of his duties as a baseball coach was entitled to be reinstated to that position and reimbursed for lost income. Effective September 6, 1963, however, the Legislature passed Public Act 242 of 1963 which amended Article III, Section 1 of the TTA, MCL 38.91. As a result, MCL 38.81(8) now states, "Continuing tenure does not apply to an annual assignment of extra duty for extra pay."

The STC first addressed the impact of the amendment to Article III, Section 1 of the TTA in 1977 in *Salvadore v St Joseph Pub Sch,* STC No. 75-25, issued April 11, 1977. In *Salvadore*, a tenured teacher was terminated based on various allegations of misconduct, including showing up late for a staff meeting after having been informed of the administration's concerns over her tardiness and failure to be present at her teaching station. One of the tenure charges alleged that the teacher had failed to uphold her responsibilities as Honey Bear advisor, an extracurricular assignment. Citing Article III, Section 1 of the TTA, the STC held that it had no jurisdiction to consider that allegation because the claim pertained to an extracurricular assignment.

In *Six v Muskegon Pub Sch*, STC No. 81-17, issued December 17, 1981, a tenured teacher, Mitchel Six, was notified that he would be terminated due to a necessary reduction in personnel. He brought an action under the TTA claiming that the school district had hired Michael Cieslak, a probationary employee, as high school physical education teacher and head coach of the football and basketball team. Six was certified and qualified to teach physical education, but the parties disputed whether he was qualified to act as head football coach. In the proceeding before the STC, Six sought only the physical education job and not the extra coaching duties associated with Cieslak's position. The district argued that it was entitled to summary disposition because the TTA did not entitle Six to get recalled to Cieslak's position. According to the district, it was permissible under the TTA for it to have linked the physical education position with the coaching job and treat the combination as one assignment. Therefore, the district asserted that since Six was not qualified to coach, he had no viable claim to any part of Cieslak's position. In support of that contention, the district cited several cases arising under the TTA which touched upon the link between athletics and a well-rounded education.

The STC relied on Article III, Section 1 of the TTA to conclude that it was improper for the school district to have linked the extra duty assignment and the teaching assignment as one unified position. According to the Tenure Commission:

> The plain language of the amendment shows that the legislature intended to remove extra duty assignments from the force of the Tenure Act altogether. Thus, the amendatory provision allows a controlling board to remove a teacher

> from an extra duty assignment without cause, and without declaring a necessary reduction in personnel. Similarly, we conclude that the amendment allows a teacher to refuse an extra duty assignment without fear of censure. Therefore, by linking the qualifications for the extra duty assignment to the regular teaching assignment, appellee presumes it has the authority under the Teachers' Tenure Act to require that a particular teacher perform the extra duty assignment. We do not believe that this provision of the Act can or should be construed in the manner in which appellee's position would require.

In *Even v Crestwood School District*, STC No. 81-60, issued May 27, 1982, a tenured teacher in the school district filed a petition with the STC alleging that the employer violated the TTA by failing to employ him in the extra-duty assignment of head baseball and head football coach. The petition asserted that the teacher had been previously assigned coaching responsibilities which he had fulfilled and for which he had been paid, and that, therefore the district's refusal to hire him for the coaching position was, in effect, a demotion and within the jurisdiction of the STC. The Tenure Commission dismissed the petition, concluding that the teacher's claim to the extra duty assignment was not a claim within its jurisdiction based upon the plain language of Article III, Section 1 of the TTA.

The STC was once again faced with a question concerning extracurricular assignments in *Reyner v Waverly Community Sch*, STC No. 85-17, issued August 31, 1993. *Reyner* arose from the school district's decision to discharge a tenured middle school music teacher. The teacher challenged that decision and the STC ruled that she was entitled to the protections of the TTA. When the parties were unable to agree on the amount of back pay to be awarded, the teacher filed a petition for a back-pay determination. She claimed that in addition to her lost salary as a teacher, she was entitled to the amounts she would have earned as a flag corps advisor and band director, both Schedule B positions. The issue in *Reyner* was whether the flag corps advisor and band director positions constituted extracurricular assignments for purposes of Article III, Section 1 of the Act. In addressing that question, the Tenure Commission relied upon its prior decisions to describe the attributes of an extra duty, extra pay assignment:

> First, a teacher may be removed from an extra duty extra pay assignment without cause. *Six v Board of Education of the Muskegon Public Schools* (81-17). Second, a teacher may elect to refuse an extra duty extra pay assignment without fear of censure. *Six*, *supra*. Third, a teacher's failure to adequately fulfill the responsibilities of the extra duty extra pay position cannot serve as grounds for discipline under the Teachers' Tenure Act. See *Salvadore v St. Joseph Public Schools* (75-25). The import of these holdings is that extra duty extra pay assignments are limited to those activities which are optional, which are beyond the functions normally and properly necessary to fulfill the duties of a teaching assignment. *Berlin v Oak Park School District* (90-30), pp 4-5.

The STC in *Reyner* concluded that the flag corps advisor and band director positions qualified as extracurricular activities outside the protection of the TTA and, therefore, that it lacked jurisdiction to adjudicate the teacher's claims for back pay. In making that determination, the Tenure Commission relied, in part, on the following facts: (1) when the teacher was

interviewed for the band director job, there was no question that it was a separate position given that she was shown the amount of the stipend and required to sign an annual contract; (2) a teaching certificate was not required for either position; (3) the teacher's probationary contract and various riders specified that neither position was "under the Tenure Act"; (4) the school district currently had a flag corps advisor who was not otherwise employed as a teacher within the district; (5) it was the district's practice that persons employed in Schedule B positions had no right to continue in those positions from year to year; and (6) all of the preparation and duties associated with performing the flag corps advisor job were not part of the school district's curriculum and could be done and were done outside of regular classroom time.

More recently, the STC once again concluded that it lacked jurisdiction over a teacher's extracurricular assignment. In *Kent v Utica Community Sch*, STC No. 04-36, issued September 27, 2005, Martha Kent, a tenured teacher, was reassigned from a drama teaching position to a position as an English teacher. As a drama teacher, Kent had also been assigned to the drama program, a position for which she received a separate stipend. Although Kent maintained the same salary as an English teacher as she had received teaching drama, her overall salary was reduced from the previous school year because she no longer received the drama stipend. On that basis, she asserted that that the school district's failure to reassign her to the drama program constituted a demotion under the TTA. Kent relied upon various provisions in the collective bargaining agreement which she claimed inextricably tied her employment as a classroom drama teacher to her assignment in the drama program. The ALJ rejected that argument, concluding that the drama program was an optional assignment which was separate and distinct from the duties she performed as a drama teacher. On appeal, the STC affirmed that determination. The Tenure Commission stated, "[T]he appellant's activities associated with producing and directing the school plays went beyond the functions necessary to teach drama, notwithstanding [the contractual provisions cited by Kent]." According to the STC, dismissal of Kent's petition was "consistent with the legislative intent underlying the amendment to the Teachers' Tenure Act excluding extra duty, extra pay positions from continuing tenure eligibility."

In the instant case, Michell's employment as boys' varsity track coach was governed by a separate one-year contract which specifically describes the assignment as an "extra-curricular activity" and specifies that "tenure is not allowed in an extra-duty assignment." The contract also states that the administration has the authority to make decisions regarding the initiation or continuation of such activity. Nothing in the collective bargaining agreement indicates that the school district may compel a teacher to accept a coaching assignment or other Schedule B activity, nor has the school district made any claim to the contrary in connection with this matter. In fact, the collective bargaining agreement provides for additional compensation to teachers who take on Schedule B assignments and states that Schedule B "applies only to positions that the majority of work is done outside the normal work day . . . or additional work is required outside the normal school year." For his work as boys' varsity track coach, Michell received a stipend in the amount of $2,596.01 above and beyond that which he earned as a math teacher. Although it is the preference of the school district that individuals assigned to Schedule B positions be certificated teachers, a certificate is not a requirement for a coaching assignment. In fact, an individual who is not even a member of the teachers' bargaining unit may be hired in a Schedule B position. For these reasons, I conclude that Michell's employment as boys' varsity

track coach constituted an extracurricular assignment under MCL 38.91(8) and, therefore, the activity was not one which is regulated by the TTA for purposes of Section 15(3)(m) of PERA.

In support of its contention that Michell's employment was regulated by the TTA, Respondent relies on various cases in which the STC affirmed disciplinary action based upon activity outside the context of a teacher's normal classroom teaching duties, including misconduct which occurred in connection with an extracurricular assignment. For example, In *Satterfield v Grand Rapids Pub Sch*, STC No. 94-08, issued November 23, 1994, aff'd 219 Mich App 438 (1996), the STC found that the school district had established reasonable and just cause for the discharge of a teacher who had pled guilty to embezzlement. Although the misconduct occurred in connection with the teacher's part-time job with another employer, the STC determined that the discipline was appropriate because the teacher had lost the respect of parents and could no longer serve effectively as a role model within the school district. In *Boyle v Lapeer County ISD*, STC No. 94-4, issued October 24, 1994, the STC affirmed the ALJ's finding that the school board had grounds for discharging a teacher who was convicted of assault and battery which had occurred at a rest stop. The STC held that "activities outside the classroom may warrant discipline where they bring such notoriety to the teacher that his/her teaching ability is impaired." In *Green v Hazel Park Community Sch*, STC No. 01-22, issued November 22, 2002, the school district issued a thirty-day suspension to a teacher based upon allegations of harassment. In determining the proper penalty to impose, the district took into consideration a prior incident which had occurred while the teacher was exercising his duties as a head coach of the boys' varsity basketball team. In affirming the discipline, the STC held that a teacher can be subjected to discipline for misconduct involving students arising out of the teacher's coaching duties. Finally, in *Fuller v Detroit Bd of Ed*, STC No. 94-36, issued May 24, 1995, a high school teacher of health and physical education became involved in a physical altercation with a student while he was coaching a girls' softball game. The STC affirmed the school district's decision to suspend the individual from his teaching assignment for three weeks.

Based upon the above decisions, Respondent asserts that the STC has jurisdiction to regulate Michell's conduct as boys' varsity track coach and, therefore, bargaining over the school district's decision not to renew Michell as coach is prohibited by Section 15(3)(m) of PERA. I disagree. All of the cases cited by the school district are distinguishable on their face in that they all involved disciplinary actions taken by public school employers against tenured teachers in their capacity as teachers. *Satterfield* and *Boyle* simply stand for the proposition that a teacher may be suspended or disciplined under the TTA for misconduct which occurred outside the classroom. Although the Commission in *Green* and *Fuller* held that misconduct which occurred in connection with extracurricular activities can be taken into consideration when disciplining a tenured teacher, in neither instance was the teacher suspended or removed from his or her position as coach. Rather, the teachers were disciplined in their roles as classroom teachers. MCL 38.91(9) explicitly states that continuing tenure does not apply to an annual assignment of extra duty for extra pay. In the instant case, Michell was not disciplined in connection with his employment as a math teacher as a result of his alleged misconduct as track coach. To the contrary, he continued to work for Respondent as a classroom teacher following that incident. The discipline which was imposed was directed solely at his employment in a Schedule B position. "The plain language of [MCL 38.91(8)] shows that the Legislature intended to remove extra duty assignments from the force of the Tenure Act altogether." *Six, supra.*

Accordingly, I am not persuaded that the STC has the authority to regulate the district's decision to remove Michell from the boys' varsity track coach position.

Charging Party further contends that since only a suspension of fifteen or more days qualifies as a "demotion" challengeable under the TTA, MCL 38.74, the mere fact that a teacher is disciplined in a manner outside the jurisdiction of the STC does not mean that Section 15(3)(m) of PERA is inapplicable. According to Charging Party, it was the intent of the Legislature in enacting the 2011 amendment to prohibit a teacher from challenging any disciplinary decision through a negotiated grievance procedure, including suspensions of less than fifteen days. It is true that in its decision in *Ionia County Intermediate Ed Ass'n, supra*, the Commission held that Section 15(3)(m) applied even though the disciplinary action at issue in that matter was a written reprimand of a tenured teacher and, therefore, not subject to the jurisdiction of the STC. Nevertheless, I do not find Charging Party's argument here persuasive. Although the STC will not hear a challenge to certain disciplinary actions, a teacher who has obtained tenure is nonetheless subject to the regulation of the TTA in connection with his or her conduct as a teacher. For example, the TTA prescribes how tenure is obtained, MCL 38.91, and sets forth restrictions on how a teacher on continuing tenure may resign his or her employment with a school district, MCL 38.111, as well as the grounds upon which a tenured teacher may take a leave of absence, MCL 38.112. However, as the cases above demonstrate, the STC simply has no authority to regulate the employment of a tenured teacher when he or she is engaged in an extracurricular assignment. For example, had Michell resigned his position as math teacher without giving the district at least 60 days notice, he would have forfeited his rights to continuing tenure under the Act. Yet, he clearly could have resigned his employment as coach at any time without invoking the jurisdiction of the Tenure Commission.

For the above reasons, I find that Michell's employment as boys' varsity track coach was not conduct regulated by the TTA and, therefore, Respondents did not violate the duty to bargain under Section 10(2)(d) of PERA by filing a grievance over Charging Party's decision not to renew his extracurricular assignment or by advancing that grievance to arbitration over the school district's objection. In so holding, I note that any other conclusion would lead to absurd results. For example, under Charging Party's interpretation of Section 15(3)(m), Michell would be prohibited from grieving the school district's decision to remove him from the extra duty, extra pay position merely because he also happens to work for the district as a teacher, whereas Section 15(3)(m) would not apply where an uncertificated individual hired by the school district solely for the purpose of coaching the boys' varsity track team had committed the very same misconduct in which Michell is alleged to have engaged.[3] Similarly, if a certificated teacher was working for the school district solely in a noninstructional position such as janitor, bus driver, cook or paraprofessional, that individual nevertheless would, under the interpretation of the statute advanced by Charging Party at oral argument, be subject to the prohibition against bargaining despite the fact that he or she had not, and may never have, worked for this or any

[3] Based upon the recognition clause in the instant collective bargaining agreement, such an individual would not be a member of the bargaining unit and would have no right to invoke the grievance process negotiated by Charging Party and the Marion EA. However, that result is specific to this school district and would not necessarily be the case elsewhere.

other school district as a teacher. Had the Legislature intended such a broad result, it could have simply defined the amendment as applying to "all certified teachers" rather than enacting the limiting phrase "public employees whose employment is regulated by [the TTA]." The inclusion of this significantly more narrow language signifies that it was the Legislature's intent to remove certificated teachers from the scope of the prohibition set forth in Section 15(3)(m) in connection with their extracurricular assignments and other noninstructional duties.

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. For the above reasons, I find that Michell was not an employee regulated by the TTA for purposes of Section 15(3)(m) of PERA and, therefore, Respondents did not violate Section 10(2)(d) by challenging his non-renewal as boys' varsity track coach through the negotiated grievance procedure over Charging Party's objection.[4] Accordingly, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by Marion Public Schools against the Marion Education Association and its President, Anthony Baldwin, and the Michigan Education Association and its UniServ Director, Chad Williams, in Case No. CU17 E-016; Docket No. 17-009462-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 11, 2018

[4] With respect to the allegations against Baldwin and Williams individually, Charging Party has not cited, nor am I aware, of any decision in the long history of the Commission in which a union representative has been held personally liable for a violation of Section 10 of the Act. In any event, given that a cease and desist order against the union would necessarily include all officers, agents and representatives, the point is largely moot.