STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

MERC Case No. CU16 A-002
-and- Hearing Docket No. 16-001867

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

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue, for Respondent

Thrun Law Firm, P.C., by Martha J. Marcero, for Charging Party

DECISION AND ORDER

On September 26, 2016, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter. She found that the Respondent, Michigan Education Association, MEA/NEA (Union) violated its duty to bargain under § 10(2)(d) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(d), by demanding that Charging Party Vassar Public Schools (Employer) arbitrate a grievance over its decision not to recall a laid off teacher in the bargaining unit represented by the Union.

The Union filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions on October 17, 2016. The Employer had until October 24, 2016, to file its response to the exceptions. The Employer filed its brief in support of the ALJ's Decision and Recommended Order on October 26, 2016. Since the Employer's brief was untimely, it has not been considered by the Commission.

In its exceptions, Respondent contends that the ALJ erred by concluding: (1) that the Employer cannot waive its defense to arbitration of a matter involving a prohibited subject of bargaining by reaching an agreement on the prohibited subject; (2) that the Union's interpretation of § 9.4 of the parties' collective bargaining agreement would lead to a conclusion that the agreement to arbitrate is unenforceable; and (3) that issues over whether the Employer violated the Teachers' Tenure Act, the teacher's constitutional and statutory rights, and various provisions of the collective bargaining agreement requiring the Employer to honor employees' legal rights are not matters to be determined in grievance arbitration. The Union also contends that the ALJ erred by recommending that the Commission order the Union to advise the arbitrator and the

Employer that the Union is withdrawing the grievance in this matter, and to cease and desist from demanding to arbitrate grievances concerning teacher layoff and recall.

We have reviewed the exceptions filed by Respondent, and find them to be without merit.

Factual Summary:

As noted in the ALJ's decision, the Employer filed a motion for summary disposition. The Union filed a brief in opposition but argued in its brief that, except as to the relief sought, there is no genuine issue of material fact.

The Union represents a bargaining unit comprised of public school teachers. A member of the bargaining unit, teacher Jeffrey Staple, was rated "minimally effective" for the 2013-2014 school year. In July 2014, Staple and several other teachers were laid off. On August 4, 2015, Staple wrote to the Employer asking to be considered for a first grade teaching position that he had been told was vacant. Later that month, the Employer posted a first grade teaching position vacancy. Staple was not recalled to work.

Section 9.4 of the parties' collective-bargaining agreement contains the following provisions:

> No grievance may be filed on the following:
>
> (1) Dismissal or discipline of a teacher.
>
> (2) Evaluation, layoff or recall of a teacher *provided the district complies with Board policy*.
>
> * * *
>
> (5) Any matters which are prohibited subjects of bargaining *provided the district complies with Board policy* (Emphasis added).

On September 9, 2015, the Union filed a grievance over the Employer's failure to recall Staple for the vacant first grade teaching position. In the grievance, the Union contended that Staple was certified and qualified for the vacant position, and that by not recalling Staple the Employer violated provisions of the parties' collective bargaining agreement, the Teachers' Tenure Act, the Revised School Code, the Michigan Constitution, and the United States Constitution. The Union asserts that by failing to retain Staple, the Employer failed to comply with the Employer's Board Policy 3131, which states in relevant part:

> It is the policy of this Board that all personnel decisions shall be based on retaining effective teachers in situations involving a staffing or program reduction or any other personnel decision resulting in the elimination of a position, as well as for hiring after such reductions/position elimination or recall to vacant positions.

The Union contends that because the Employer failed to comply with Board Policy 3131, the matter is arbitrable pursuant to § 9.4 of the parties' collective bargaining agreement. The Employer denied the grievance at all levels. The Union sought to arbitrate the grievance. The Employer objected to arbitration and asserted that the arbitrator does not have jurisdiction over the matter. On January 22, 2016, the Employer filed the unfair labor practice charge in this matter, contending that the Union violated § 10(2)(d) of PERA by demanding to arbitrate a grievance over prohibited subjects of bargaining.

Discussion and Conclusions of Law:

On exceptions, the Union contends that its grievance over the Employer's failure to recall Staple from layoff is arbitrable. We disagree for the reasons stated in the ALJ's decision and for the following reasons.

The issue of whether a party violates its duty to bargain by seeking arbitration of a grievance over a prohibited subject of bargaining first came before us in *Pontiac Sch Dist*, 28 MPER 34 (2014). In that case and in two subsequent cases on the issue, *Ionia Co Intermediate Ed Assn*, 30 MPER 18 (2016); and *Shiawassee Intermediate Sch Dist Ed Assn*, 30 MPER 13 (2016), we held that a prohibited subject of bargaining can never become an enforceable part of a collective bargaining agreement. See, also, *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995), aff'd 453 Mich 362 (1996). We went on to explain in *Ionia, Shiawassee*, and *Pontiac*, that grievance arbitration regarding a prohibited subject of bargaining constitutes an effort to unlawfully enforce contract provisions or other agreements that have been made unenforceable by § 15(3) of PERA and is a breach of the duty to bargain.

Our decision in *Pontiac* found that the union violated its duty to bargain under § 10(3)(c)[1] of PERA by seeking to arbitrate a grievance over the employer's decision to transfer a school employee; the employer's decision regarding the employee's placement was a prohibited subject of bargaining under § 15(3)(j). *Ionia* and *Shiawassee* involved union efforts to arbitrate grievances over the respective employers' discipline of school employees. Those employers' decisions regarding the discipline of their employees were prohibited subjects of bargaining under § 15(3)(m). The matter before us involves decisions made by the Employer regarding Staple's layoff or recall. Such decisions are prohibited subjects of bargaining under § 15(3)(k). See *Pontiac Sch Dist*, 28 MPER 1 (2014).

§ 15(3)(k) 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:
>
> * * *
>
> (k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies

[1] PERA was amended by 2012 PA 349 after the charge was filed in *Pontiac Sch Dist*, 28 MPER 34 (2014). With the addition of Act 349 to PERA, the language that had been in § 10(3)(c) was moved to § 10(2)(d) of PERA.

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

The Union does not dispute that teacher lay off and recall policies are prohibited subjects of bargaining under § 15(3)(k) of PERA. However, the Union contends that the language in § 9.4 of the parties' collective bargaining agreement, read in conjunction with the Employer's Board Policy 3131, amounts to a waiver of the Employer's right to refuse to arbitrate certain grievances involving prohibited subjects of bargaining.

Grievance Arbitration Regarding the Issue of Due Process in the Employer's Failure to Recall

The Union contends that Staple has a constitutionally protected property interest in continued employment. The Union asserts that by failing or refusing to recall Staple, the Employer effectively discharged him. The Union further alleges that since the Employer failed to provide Staple with notice of his permanent discharge and failed to provide him with an opportunity for a hearing, the Employer deprived Staple of his property interest in continued employment without due process. The Union does not dispute that the Employer had the right to lay off Staple, but contends that the Employer's failure to recall Staple amounted to a discharge in violation of Staple's due process rights under both the United States Constitution and the Michigan Constitution.

We addressed the legality of attempts to arbitrate grievances over alleged violations of public school employees' statutory and constitutional rights stemming from public school employers' disciplinary decisions in *Ionia Co Intermediate Ed Assn*, 30 MPER 18 (2016) and *Shiawassee Intermediate Sch Dist Ed Assn*, 30 MPER 13 (2016). In *Ionia* and *Shiawassee*, the employers suspended teachers for disciplinary reasons. Under § 15(3)(m), public school employers' decisions to discipline teachers are prohibited subjects of bargaining and, therefore, not subject to grievance arbitration. In the matter before us, a teacher who was rated minimally effective was not recalled from layoff. In each of the three cases, the union has argued that the public school employer's actions violated the employee's due process rights. In *Shiawassee*, we explained:

> Where a statutory or constitutional right has been incorporated into a collective bargaining agreement, an effort to enforce that provision of the collective bargaining agreement in arbitration is prohibited by § 15(3)(m) to the extent that the grievance concerns a decision by a public school employer related to teacher discipline or discharge.

Although *Shiawassee* dealt with prohibited subjects of bargaining under § 15(3)(m) and this case deals with prohibited subjects of bargaining under § 15(3)(k), the situations are analogous. Under § 15(3)(k), Staple's due process rights are not enforceable in grievance arbitration when the grievance addresses decisions about a public school employers' policies regarding personnel decisions during staffing reductions or recalls from staff reductions.

In *Ionia*, we further explained the limitations on grievance arbitration involving prohibited subjects of bargaining:

> Where a grievance raises the question of whether a public school employer's disciplinary procedures comply with constitutional due process requirements, that grievance is questioning the employer's decisions about procedures used in the discipline. If the Union pursued the arbitration solely with respect to the due process issue, the Union would be demanding that the arbitrator examine the procedure the Employer decided to use in disciplining Eis. To the extent that the grievance addresses a public school employer's decisions relating to the discipline or discharge of a teacher, arbitration of that grievance is unlawful under § 15(3)(m). See *Shiawassee*. Thus, if the Union had limited its request for arbitration of the grievance to the issue of whether the Employer failed to provide Eis with due process, the Union would be seeking review of a decision the Employer made related to the disciplinary procedures, even if the Union did not challenge the appropriateness of the discipline.

Although the language of *Ionia* addresses prohibited subjects of bargaining under § 15(3)(m), it is also analogous to the matter before us. To the extent that the grievance in this matter raises the question of whether the Employer's procedures in failing to recall Staple comply with constitutional due process requirements, the grievance is questioning the Employer's decisions about the Employer's procedures and policies regarding personnel decisions made when conducting a recall from a staffing or program reduction. The grievance is also questioning the Employer's decisions made pursuant to its policies on personnel decisions during staffing or program reductions or recalls and the Employer's decisions about the impact of those decisions on an individual employee. All of those matters are prohibited subjects of bargaining under § 15(3)(k) of PERA.

Board Policy 3131

The Union contends that by failing to retain Staple, the Employer violated the Employer's Board Policy 3131. Noting that Staple was last rated as minimally effective, the Union contends that he is within the group of effective teachers that Board Policy 3131 was designed to retain. The possible ratings that could have been given to Staple were: highly effective, effective, minimally effective, and ineffective. The Union contends that the ALJ interpreted the language of Board Policy 3131 to mean that the Employer does not recall teachers below the "effective" mark. In Charging Party's Brief in Support of Motion for Summary Disposition, the Employer states "Mr. Staples was not an effective teacher" and refers to Board Policy 3131. Thus, it appears that the question of whether Staple is within the group of teachers that Board Policy 3131 was designed to retain may be a disputed matter between the parties. However, the resolution of that dispute is not material to the resolution of the case before this Commission.

In *Pontiac Sch Dist,* 28 MPER 1 (2014), the Commission expressly found that the Employer had no duty to bargain over procedures relating to the layoff or recall of teachers, because those procedures are prohibited subjects of bargaining under § 15(3)(k). In this matter, the Union seeks to challenge the Employer's interpretation of Board Policy 3131. That policy is covered by § 15(3)(k), since it is one of the Employer's "policies regarding personnel decisions when conducting a staffing or program reduction . . . when conducting a recall from a staffing or program reduction. . . or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position."[2]

As such, decisions made by the Employer regarding the implementation of Board Policy 3131, any decision made by the Employer pursuant to that policy, and the impact of those decisions on an individual employee are prohibited subjects of bargaining under § 15(3)(k). Thus, within the authority granted to it under § 15(3)(k) and § 15(4) of PERA, the Employer could determine that Board Policy 3131 was designed to retain only teachers rated highly effective and effective. Additionally, the Employer's decision not to recall Staple may be considered a decision about the implementation of the Employer's policies regarding personnel decisions when conducting a recall, a decision made by the Employer pursuant to those policies, or a decision about the impact of those decisions on an individual employee. Thus, the Employer's decision, regardless of the interpretation of Board Policy 3131, is a prohibited subject of bargaining and not arbitrable.

Provisions in the Collective Bargaining Agreement regarding Grievances

The Union relies on the language in § 9.4 of the parties' contract that prohibits the filing of grievances over the evaluation, layoff, or recall of a teacher unless the Employer fails to comply with board policy. Respondent contends that the Employer's failure to recall Staple is grievable because the Employer's failure to recall Staple did not comply with Board Policy 3131. The Union acknowledges that it cannot bargain over board policy, but contends that by agreeing to language in the collective bargaining agreement that creates an exception to the prohibition against grievances over layoffs and recalls, the Employer has established circumstances that constitute an arbitrable grievance.

The Union also contends that the language of § 9.4 provides a waiver by the Employer of its right to refrain from arbitration in cases where the Employer failed to comply with its own policy. The Union argues that when the Employer negotiates a collective bargaining agreement requiring its adherence to its own policies, the Employer waives its right to avoid arbitration if it violates those policies.

Although the language in § 9.4 of the parties' contract, which prohibits the filing of certain grievances unless the Employer fails to comply with its own board policy, could be interpreted to establish an exception to the prohibition against such grievances, it is neither a waiver of the Employer's rights under § 15(4), nor is it an enforceable agreement to arbitrate grievances over prohibited subjects of bargaining. We have held that parties may discuss prohibited subjects of bargaining, and, *to a certain point,* may process grievances regarding such subjects. As we stated in *Ionia Co Intermediate Ed Assn,* 30 MPER 18 (2016):

[2] § 15(3)(k)

> Processing a grievance regarding teacher discipline may be considered to be no more than discussion of the public school employer's decisions regarding teacher discipline. However, attempting to arbitrate that grievance goes beyond the discussion stage, it is much like insistence upon bargaining a prohibited subject when the other party has refused to do so. See, for example, *Calhoun Intermediate Ed Assn*. Grievance arbitration regarding a prohibited subject of bargaining, constitutes an effort to unlawfully enforce contract provisions or other agreements that have been made unenforceable by § 15(3). See *Pontiac Sch Dist*, 28 MPER 34 (2014).

Thus, the Employer's agreement to language that prohibits the filing of grievances over certain matters except when the Employer fails to comply with its own policies, may indicate that the Employer is willing to discuss such grievances. However, arbitration goes beyond the discussion stage. It is an effort to enforce a contractual provision. Where that contractual provision involves a prohibited subject of bargaining, that provision is unenforceable and is, therefore, not arbitrable.

Moreover, § 15(4) of PERA clearly establishes that prohibited subjects of bargaining are matters solely within public school employers' authority. It states:

> Except as otherwise provided in subsection (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).

Although the language of § 9.4 of the parties' collective bargaining agreement may make certain matters grievable, those matters can only be considered grievable to the extent the Employer allows. The prohibited subjects of bargaining addressed by § 9.4 are "within the sole authority" of the Employer to decide.

The language of § 9.4 cannot act as a waiver of the Employer's rights and responsibilities under § 15(3) or (4) of PERA. A waiver of the Employer's statutory rights must be clear and unmistakable. See, *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 319-20 (1996); *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 460 (1991), citing *Metropolitan Edison Co v NLRB*, 460 US 693, 708, 103 S Ct 1467, 1477, 75 L Ed 2d 387 (1983). The language of § 9.4 of the collective bargaining agreement says nothing about waiver of the Employer's right to decline to participate in arbitration over a prohibited subject of bargaining. Additionally, even if the collective bargaining agreement had contained clear and explicit language waiving the Employer's rights under § 15(3) and (4) of PERA, such language would not be enforceable. As the ALJ concluded, if the Union's interpretation of the language in § 9.4 of the collective bargaining agreement were correct, that provision would be an agreement on a prohibited subject of bargaining and, therefore, would not be enforceable.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find the

Union's exceptions to be without merit and affirm the Administrative Law Judge's decision. Accordingly, we 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: March 24, 2017

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY THE VASSAR PUBLIC SCHOOLS, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **MICHIGAN EDUCATION ASSOCIATION, MEA/NEA,** 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 grievances concerning teacher layoff or recall, topics made prohibited subjects of bargaining by Section 15(3)(k) and Section 15(4) of PERA.

WE WILL advise the arbitrator and the Employer that we are withdrawing the grievance(s) we filed on September 9 and/or November 3, 2015, regarding the Employer's refusal to recall teacher Jeffrey Staple from layoff.

WE WILL NOT take action to enforce any arbitration award which may have been issued pursuant to the grievance(s).

MICHIGAN EDUCATION ASSOCIATION, MEA/NEA

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.

MERC Case No. CU16 A-002

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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

Case No. CU16 A-002
Docket No. 16-001867-MERC

-And-

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

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue, for Respondent

Thrun Law Firm, P.C., by Martha J. Marcero, for Charging Party

DECISION AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY DISPOSITION

On January 22, 2016, the Vassar Public Schools (the Employer) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Michigan Education Association, MEA/NEA (the Union) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and 423.216. The charge alleges that the Union, the collective bargaining representative for the Employer's teachers, violated Section 10(2)(d) of PERA by demanding to arbitrate a grievance over prohibited subjects of bargaining, in this case the Employer's policy regarding layoff and recall of teachers and its decision not to recall a particular teacher. Pursuant to Section 16 of the Act, the charge was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

At my direction, the Union filed a position statement responding to the allegations in the charge on February 26, 2016. On April 7, 2016, the Employer filed a motion for summary disposition. On April 26, 2016, the Union filed a brief in opposition to the Employer's motion. Although not titled a motion for summary disposition, the Union argued that the charge should be summarily dismissed for failure to state a claim upon which relief can be granted under PERA and because, except as to the relief sought, there is no genuine issue of material fact. I find that there are no material disputes of fact in this case. Based on undisputed facts set forth in the

pleadings and repeated in the fact section below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The parties' current collective bargaining agreement covers the period September 1, 2014, through August 31, 2017. The agreement contains a grievance procedure ending in binding arbitration. The grievance procedure states that no grievance may be filed on the evaluation or the layoff or recall of a teacher provided the district complies with Board policy. It also states that no grievance may be filed concerning any matters which are prohibited subjects of bargaining provided the district complies with Board policy.

On July 14, 2014, the Employer laid off seven teachers as part of a reduction in staff. One of the teachers was Jeffrey Staple. Staple was selected for layoff because he received a "minimally effective" rating on his teaching evaluation for the 2013-2014 school year.

A year later, in August 2015, the Employer had a first grade teaching opening. The Employer did not recall a laid off teacher to fill the opening but posted it as a vacancy.

On either September 9 or November 3, 2015 (see below), the Union filed a grievance on Staple's behalf alleging that the Employer's failure to recall him for the first grade teaching vacancy violated Article III, Section 1 of the Teachers' Tenure Act, MCL 38.91; Section 11a(3) of the Revised School Code, MCL 380.11a(3); Board Policy No. 3131; the United States and Michigan Constitutions; and Articles 2, 5.1, and 19.4 of the parties' collective bargaining agreement. The grievance was processed through steps two and three of the grievance procedure, with the Employer denying the grievance at each step. On December 21, 2015, the Union filed a demand to arbitrate. On January 8, 2016, the Employer demanded that the Union withdraw the grievance because it concerned a prohibited subject of bargaining. It also threatened to file an unfair labor practice charge. The grievance was not withdrawn, and the Employer filed this charge. As indicated above, the charge alleges that the Union violated Section 10(2)(d) of PERA by demanding arbitration of prohibited subjects of bargaining, the Employer's policy concerning the layoff and recall of teachers and the Employer's decision not to recall a laid off teacher.

Facts:

Background

Section 15(3)(k) of PERA makes the following prohibited subjects of bargaining between a public school employer and a labor organization representing its teachers:

(k) Decisions about the *development, content, standards, procedures, adoption, and implementation of the public school employer's policies* regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, *when conducting a recall from a staffing or program reduction* or any other personnel determination resulting in the elimination of a position, or *in hiring after a staffing or program reduction* or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380. 1248, *any decision made by the public school employer pursuant to those policies*, or the impact of those decisions on an individual employee or the bargaining unit. [Emphasis added]

Section 15(4) states:

(4) Except as otherwise provided in subsection 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.

Article 6 of the parties' collective bargaining agreement is entitled "Reductions in Personnel and Recall." Articles 6.2 through 6.4 read as follows:

6.2 Any laid off teacher which the Board determines to recall must accept the first offer of appointment to the vacancy for which s/he is certified and highly qualified within twenty (20) days of the date of mailing of such offer.

6.3 Notification of appointment shall be sent by certified mail to the teacher's last known address with a copy to the Association.

6.4 The re-hiring of laid off teachers shall be in the sole discretion of the Board.

As discussed above, the grievance procedure in the collective bargaining agreement prohibits the filing of grievances on certain topics. Article 9.4 includes the following:

No grievance may be filed on the following:

1. Dismissal or discipline of a teacher.

2. Evaluation, layoff or recall of a teacher provided the district complies with Board policy.

3. Any matter in [the] jurisdiction of the State Tenure Commission.

4. Non-appointment to or removal from extracurricular positions.

5. Any matters which are prohibited subjects of bargaining provided the district complies with Board policy.

The policies approved by the Employer's Board of Education include Board Policy 3131, which provides:

> It is the policy of this Board that all personnel decision shall be based on retaining effective teachers in situations involving a staffing or program reduction or any other personnel decisions resulting in the elimination of a position, as well as for hiring after such reductions/position elimination or recall to vacant positions.

Each year teachers receive one of four ratings: highly effective, effective, minimally effective, or ineffective. Under Board Policy 3131, the Employer does not recall any laid off teacher rated below effective. As indicated above, Staple received a "minimally effective" rating for the 2013-2014 school year.

The Grievance

On August 4, 2015, Staple wrote a letter to Employer Superintendent Tom Palmer stating that he had heard from a Union representative that the Employer had a first grade vacancy. Staple stated that he was interested in the position and asked to be considered to fill it. Staple did not receive a response to his letter. On August 25, 2015, the Employer posted the position as a vacancy.

On September 9, 2015, the Union filed the following grievance:

> By refusing to return the grievant, Jeffrey Staples [sic], to an available position for which he is certified and qualified, the district has violated its obligation and duty under section 11a(3) of the Revised School Code to exercise its rights and powers in a manner consistent with the laws of the State of Michigan (inclusive of the Revised School Code) as well as the United States Constitution as well as the Michigan Constitution.

Section 11a(3) of the Revised School Code, MCL 380.11a(3), states:

> (3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, *except as otherwise provided by law*, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interest of public elementary and secondary education in the school district, including, but not limited to, all of the following: [Emphasis added]

On September 21, 2015, the Union amended the grievance to ask that Staple not only be recalled to the position, but that he be made whole for monetary losses suffered as a result of the Employer's refusal to recall him at the beginning of the school year.

The grievance was denied by the Superintendent at level two of the grievance procedure on September 9 and by the Employer's Board at level three on October 1, 2015. The reason given for denial was that, per Article 6.4 of the contract, the re-hiring of laid off teachers was within the sole discretion of the Board.

On November 3, 2015, the Union amended its grievance, or refiled it. The November 3, 2015, grievance read as follows:

> By refusing to return the grievant, Jeffrey Staple, to an available position for which he is certified and qualified, the district has violated his right to continuous employment as guaranteed by Article 1. Section 1 of the Michigan Teachers' Tenure Act.
>
> By refusing to return the grievant to an available position for which he is certified and qualified, the district has deprived the grievant of a significant property interest in the absence of procedural and substantive due process in violation of the 14th Amendment of the United States Constitution as well as Article 1, Section 17 of the Michigan Constitution.
>
> By refusing to return the grievant to an available position for which he is certified and qualified, the district has violated its obligation and duty under Section 11a(3) of the Revised School Code to exercise its rights and powers in a manner consistent with the laws of the State of Michigan (inclusive of the Revised School Code) as well as the United State Constitution and Michigan Constitution.
>
> By refusing to return the grievant to an available position for which he is certified and qualified, the Vassar School District has violated its obligation and duty under the management rights and board rights provision of the collectively bargained Master Agreement.
>
> By adopting a policy on layoff and recall which violates Article 1, Section 1 of the Michigan Teachers' Tenure Act as well as the United States Constitution and Michigan Constitution, the Vassar School District has violated its obligation and duty under Section 11a of the Michigan Revised School Code as well as its obligation and duty under the management rights/board rights provision of the collectively bargained Master Agreement.

Section 1(1) of the Michigan Teachers' Tenure Act states:

> After the satisfactory completion of the probationary period, a teacher is considered to be on continuing tenure under this act. A teacher on continuing

> tenure shall be employed continuously by the controlling board under which the probationary period has been completed and shall not be dismissed or demoted except as specified in this act. Continuing tenure is held only in accordance with this act.

Article 2 of the collective bargaining agreement, the management rights/board rights provision referred to in the grievance, reads as follows:

> 2.1 It is recognized by all parties hereto that the Board, on its own behalf and on behalf of the electors of the district, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Michigan, and of the United States. It is further recognized that the exercise of said powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices and furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent that such specific and express terms hereof are in conformance with the Constitution and laws of the State of Michigan and the Constitution and laws of the United States.
>
> 2.2 Nothing contained herein shall be considered to deny or restrict the Board of its rights, responsibilities and authority under the Michigan General Schools Law, or any other laws or regulations. Except as specifically stated by this Agreement all the rights, powers and authority the Board had prior to this Agreement are retained by the Board. Such rights shall include, by way of illustration and not by way of limitation, the right to:
>
> ** *
>
> C. Direct the working forces, including the right to hire, promote, suspend and discharge employees, transfer employees, assign work or duties to employees, determine the qualifications of employees, determine the size of the workforce, and to lay off employees.

The collective bargaining agreement also includes the following provisions:

> 5.1 (Teacher Rights and Privileges). . . . The Board undertakes and agrees that *it will not directly or indirectly discourage or deprive or coerce any teacher in the enjoyment of any rights conferred by Act 379 or other laws of Michigan or the Constitution of Michigan and the United States* . . . [Emphasis added]
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> 19.4 This Agreement shall supersede any rules, regulations or practices of the Board which shall be contrary to or inconsistent with its terms. The provisions of this Agreement by reference shall be incorporate into and be considered part of the established policies of the Board.

On November 23, 2015, Gene Pierce, who had replaced Palmer as the Employer's Superintendent, sent the Union a letter denying the November 3 grievance for the following reasons: (1) Staple was not eligible for recall because under Board Policy 3131 only "effective" teachers are recalled; (2) the determination not to recall Staple was within the district's sole authority as it was a prohibited subject of bargaining, and filing and pursuing the grievance constituted an unfair labor practice by the Union; (3) the Employer acted within its authority under Article 2.2 of the contract; (4) Article 6.4 states that the re-hiring of laid off teachers is in the sole discretion of the Board; (5) Under Section 9.4 of the contact, no grievance may be filed on the layoff of a teacher or any matters that are prohibited subjects of bargaining provided the district complies with Board policy; (6) the grievance was untimely as it was filed more than 15 days after the date of notice; and (7) the claims of statutory and constitutional violations cited in the grievance were not valid breach of the collective bargaining agreement claims and not grievable.

On December 21, 2015, the Union filed a demand for arbitration with the American Arbitration Association (AAA). On January 8, 2016, the Employer's counsel wrote a letter to the Union stating that since layoff and recall is a prohibited subject of bargaining solely within the authority of the Employer, an arbitrator had no authority to review the Employer's actions. The letter further stated that the Employer would not recognize or comply with any determination made by an arbitrator, and that the Employer would file an unfair labor practice if the Union did not withdraw the grievance by January 18, 2016.

The Union did not withdraw the grievance, and an arbitrator, Mario Chiesa, was selected to hear it. In late January, the Employer's counsel sent a letter to the AAA repeating the Employer's claim that an arbitrator had no jurisdiction to hear the case and citing Article 9.4(2) and 9.4(5) of the contract. The Union responded with a letter in which it argued that the Employer had not complied with Board Policy 3131 because Staple, since he had been rated minimally effective, constituted an effective teacher under this policy. According to correspondence from the AAA attached to the Union's brief in this case, Arbitrator Chiesa decided to schedule a hearing date and consider what he characterized as the Employer's motion to dismiss at the hearing.

Discussion and Conclusions of Law:

It is now established that a party violates its duty to bargain in good faith under PERA by processing to arbitration a grievance filed over a prohibited subject of bargaining. In *Pontiac Sch Dist*, 28 MPER 34 (2014), the parties' expired collective bargaining agreement required involuntary transfers to different assignments to be made on the basis of seniority and gave teachers who were involuntarily transferred priority in the filling of vacancies. Section 15(3)(j) of PERA prohibits bargaining over any decision made by a public school employer regarding teacher placement. The Commission held in *Pontiac* that "teacher placement" includes reassignment and transfer decisions. It also held the union violated its duty to bargain by advancing a grievance over the reassignment of a teacher to arbitration. The Commission noted

that prohibited subjects of bargaining 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), and that, although the parties may discuss prohibited subjects, Section 15(3) of PERA prohibits them from bargaining over those subjects. *Calhoun Intermediate Ed Assn, MEA/NEA*, 28 MPER 26 (2014), aff'd, ____ Mich App ____ [29 MPER 42] (2016). It concluded that insisting on processing a grievance over the employer's objection was analogous to insisting on negotiating over a prohibited subject of bargaining. The Commission held that the union was also attempting to enforce contract provisions and/or past practices made unenforceable by Section 15(3)(j) of PERA.

In *Shiawassee Intermediate School District Education Assn, MEA/NEA*, 30 MPER 13 (2016), the employer alleged that the union violated its duty to bargain by processing to arbitration a grievance alleging that the procedures used by the employer in disciplining a teacher were not applied properly. The Commission concluded that the union had gone beyond the discussion stage of the grievance procedure by attempting to use arbitration to enforce contract provisions that applied to teacher discipline, a topic made a prohibited subject of bargaining by Section 15(3)(m) of PERA. In *Ionia Co Intermediate Education Assn*, ____ MPER ____ (Case No. CU15 H-024, issued August 15, 2016), the Commission reached the same conclusion.

Section 15(3)(k) of PERA begins by prohibiting bargaining about the "development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or … when conducting a recall from a staffing or program reduction." It then goes on to prohibit bargaining over any decision made by the public school employer pursuant to those policies and the impact of these decisions. In *Pontiac Sch Dist*, 28 MPER 1 (2014), the Commission held that Section 15(3)(k) is broadly written, and prohibits bargaining over the procedures used by public school employers when conducting layoffs and recalls. I find that this plain language of this section also prohibits bargaining over the development and implementation of employer policies for selecting employees for layoff and recall, as well as individual decisions made pursuant to those policies.

The Union does not dispute that both the Employer's policy for selecting teachers for layoff and recall and individual decisions made pursuant to that policy are prohibited subjects of bargaining under Section 15(3)(k). However, it argues that the legal claims made in the grievance are not over prohibited topics, but rather concern other provisions of the parties' collective bargaining agreement. It maintains that nothing in the collective bargaining agreement or PERA precludes it from grieving and arbitrating violations of these other valid and binding provisions, and that the parties have agreed that violations of these provisions could be advanced to arbitration.

At the time the motions and responses in this case were filed with me, a Decision and Recommended Order had been issued in *Shiawassee Intermediate Ed Assn*, but the Commission had not issued its decisions in either *Shiawassee* or *Ionia Co Intermediate Education Assn.* Although *Shiawassee* and *Ionia* involved demands to arbitrate grievances over teacher discipline,

and the grievance in the instant case is alleged to constitute a grievance over teacher layoff and recall, the issues presented in these three cases are similar and the Commission decisions in *Shiawassee* and *Ionia* are instructive.

First, the Commission held in *Shiawassee,* and reiterated in *Ionia,* that a union cannot lawfully use arbitration to enforce employer policies or violations of contract provisions incorporating statutory or constitutional rights if the grievance it seeks to arbitrate involves a prohibited subject of bargaining. As the Commission stated in *Shiawassee,*

> [W]here a grievance stemming from the discipline of discharge of a teacher alleges a violation of a statutory or constitutional right incorporated into the collective bargaining agreement, the arbitrability of that grievance depends upon whether the grievance seeks to enforce the statutory or constitutional right in the context of teacher discipline or discharge. Where a statutory or constitutional right has been incorporated into a collective bargaining agreement, an effort to enforce that provision of the collective bargaining agreement in arbitration is prohibited by Section 15(3)(m) to the extent that the grievance concerns a decision by a public school employer related to teacher discipline or discharge. . .
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> In looking at the plain language of Section 15(3)(m), it is clear that this subdivision addresses decisions about employer policy as well as other decisions related to discipline or discharge. Section 15(3)(m) makes decisions about the development, content, standards, procedures, and adoption of a policy regarding the discharge or discipline of an employee prohibited subjects of bargaining. Therefore, demanding to arbitrate a grievance over alleged violations of the aforementioned board policies and articles of the collective bargaining agreement in the discipline of an employee is an effort to challenge a decision regarding the implementation of the Employer's policies regarding employee discipline.

Second, the argument that the employer agreed to arbitrate a particular prohibited subject or subjects does not constitute a defense because if parties do bargain over prohibited subjects and reach an agreement on those subjects, that agreement is unenforceable. *Shiawassee.*

In the instant case, Section 9.4 of the collective bargaining agreement states that no grievance shall filed over recall of a teacher, or any matters involving a prohibited subject of bargaining, provided the district complies with Board policy. The Union interprets Section 9.4 as giving the Union the contractual right to arbitrate alleged violations by the Employer of its own policies concerning layoff and recall. However, I conclude that even if the Union's interpretation of Section 9.4 is correct, such an agreement - an agreement to arbitrate over a prohibited subject – is not be enforceable. As Section 15(4) states, matters made prohibited subjects of bargaining are, for purposes of PERA, within the sole discretion of the public school employer. That is, a public school employer cannot waive its rights nor can it cede to an arbitrator the right to make decisions regarding prohibited subjects. This includes, I find, whether the public school employer has violated its own policies in making a particular decision on a prohibited subject, such as a decision about whether to recall a particular teacher after layoff.

The Union also alleges that the Employer violated the Teachers' Tenure Act, Staple's constitutional and statutory due process rights, and various provisions of the contract as well as MCL 380.11a(3) requiring the Employer to honor Staple's legal rights. If I understand the Union's argument correctly, it asserts that Staple, although nominally laid off, was de facto discharged because the Employer refuses to recall him or consider him for any vacancy. Thus, according to the Union, Staple was deprived of his constitutional rights, including an opportunity for a post-termination hearing, and his rights to continuous employment under the Teachers' Tenure Act. As the Commission made clear in *Shiawassee*, however, questions of whether an employer has violated an employee's constitutional or statutory rights by taking actions made prohibited subjects of bargaining are not matters to be determined in grievance arbitration. Therefore, the issues of whether the Employer violated Staple's due process rights or rights under the Teachers' Tenure Act when it refused to recall him are not arbitrable, and the Union could not lawfully demand to arbitrate Staple's grievance.

In accord with the findings of fact and conclusions of law above, I conclude that the Union violated its duty to bargain in good faith and Section 10(2)(d) of PERA by demanding that the Employer arbitrate a grievance over a prohibited subject of bargaining, the recall of a teacher. I recommend that the Commission grant the Employer's motion for summary disposition, deny the Union's motion for summary disposition, and issue the following order.

RECOMMENDED ORDER

The Michigan Education Association, MEA/NEA, its officers and agents, are hereby ordered to:

1. Cease and desist from demanding to arbitrate grievances concerning teacher layoff and recall, topics made prohibited subjects of bargaining by Section 15(3)(k) and Section 15(4) of PERA.

2. Advise the arbitrator and the Vassar Public Schools that the Union is withdrawing the grievance(s) it filed on September 9 and/or November 3, 2015, regarding the Employer's refusal to recall teacher Jeffrey Staple from layoff.

3. Refrain from taking action to enforce any arbitration award which may have been issued pursuant to the grievance(s).

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 26, 2016