STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHARLOTTE PUBLIC SCHOOLS,
Public Employer-Charging Party,

MERC Case No. CU15 K-041
-and- Hearing Docket No. 15-060661

EATON COUNTY EDUCATION ASSOCIATION/
CHARLOTTE EDUCATION ASSOCIATION,
Labor Organization-Respondent.
_____/

APPEARANCES:

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

White Schneider PC, by Jeffrey S. Donahue and Erin M. Hopper, for Respondent

DECISION AND ORDER

On April 26, 2017, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 24, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CHARLOTTE PUBLIC SCHOOLS, Case No. CU15 K-041
Public Employer-Charging Party, Docket No. 15-060661-MERC

-and-

EATON COUNTY EDUCATION ASSOCIATION/
CHARLOTTE EDUCATION ASSOCIATION,
Labor Organization-Respondent.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Martha J. Marcero, for the Public Employer-Charging Party

White Schneider PC, by Jeffrey S. Donahue and Erin M. Hopper, for the Labor Organization-Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On November 18, 2015, Charlotte Public Schools (Charging Party or Employer), filed the present unfair labor practice charge against the Eaton Education Association/Charlotte Education Association (Respondent or Association). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

Charging Party asserts in its charge that the Association has violated PERA by seeking to arbitrate the District's decisions over a prohibited subject of bargaining.[1]

[1] Charging Party in its initial filing referenced Section 10(3)(c) of PERA as being violated but later clarified in both its motion and post hearing filings that it was alleging that the Association's conduct was in violation of Section 10(2)(d) of the Act.

A pre-hearing conference was held on December 21, 2015, at which time counsel for Charging Party indicated that it would be filing a motion seeking summary disposition in its favor. A briefing schedule was established. Charging Party's motion and brief in support were received on January 26, 2016. Respondent's response and brief in opposition were received on February 19, 2016. Both parties requested oral argument. Although not titled as such, Respondent's response did request that summary disposition be granted in its favor. Oral argument was initially scheduled for March 25, 2016, but was subsequently adjourned to April 7, 2016.

Background:

The following facts are not in dispute by parties.

In effect at all times relevant to this proceeding is the parties' 2014-2016 collective bargaining agreement. Article 3 of the Agreement, entitled "Administrative Rights" stated in the relevant part:

> A. The Board, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation except as expressly provided in this Agreement, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws of the Constitution of the State of Michigan and of the United States, including, and without limiting the generality of the foregoing, the right:
>
> * * *
>
> 2. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, or their dismissal, or demotion; and to promote and transfer all such employees.

Article 4, entitled "Association and Teacher Rights" provided in the relevant part:

> A. Pursuant to Act 379 of the Public Acts of 1965, the Board hereby agrees that every teacher shall have the right freely to organize, join, and support the Association for the purpose of engaging in collective bargaining or negotiation and other concerted activities for mutual aid and protection. As a duly elected body exercising governmental power under color of law of the State of Michigan, 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 Constitutions of Michigan and the United States and that it will not discriminate against any teacher with respect to hours, wages, or any terms or conditions of employment by reason of his membership in the Association, his participation in any membership in the Association, his participation in any activities of the Association or collective professional negotiations with the Board, or his

institution of any grievance, complaint, or proceeding under this Agreement or otherwise with respect to any terms of conditions of employment, as defined by the Master Agreement.

B. Nothing contained herein shall be construed to deny or restrict to any teacher rights he may have under the Michigan General School Laws. The rights granted to teachers in this Agreement shall be deemed to be in addition to those provided elsewhere.

Article 10, entitled "Grievance Procedure" states in the relevant part:

A. The primary purpose of this procedure is to secure, at the lowest level possible, equitable solutions to the problems of the parties to the dispute.

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C. A claim by any teacher or the Association that there has been a violation, misinterpretation or misapplication of any provision of this Agreement may be processed as a grievance as hereinafter provided.

Article 16, entitled "Miscellaneous Provisions" provides in Subsection G:

> This Agreement shall supersede any rules, regulations, or practices of the Board which shall be contrary to or inconsistent with its terms. It shall likewise supersede any contrary or inconsistent terms contained in any individual teacher contracts heretofore in effect. All future individual teacher contracts shall be made expressly subject to the terms of this Agreement. The provisions of this Agreement shall be incorporated into and be considered part of the established policies of the Board.

Additionally, the Policy 3131, entitled "Staff Reductions/Recalls" of the District's Board of Education's Bylaws and Policies provided in the 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 eliminations or recall to vacant positions. Length of service or tenure status may only be considered by the administration when all other factors, as listed below, are considered equal amongst the potentially affected teachers.
>
> The effectiveness of teachers shall be measured in accordance with the District's performance evaluation system developed under Section 1249 of the School Code, and the personnel decisions shall be based on the following factors…

On June 9, 2015, the District laid off two teachers, Angela Kimble and Kris Bristol. Both teachers had been rated minimally effective in the 2014-2015 school year.

Prior to the start of the 2015-2016 school year, two teachers resigned their employment with the district. Neither Kimble nor Bristol were recalled to either of the two newly vacated positions.

Both Kimble and Bristol filed individual, but identical, grievances on August 27, 2015, challenging the District's decision not to recall them and claimed violations of multiple state statutes, including Article III, Section 1 of the Teachers' Tenure Act (TTA) and Section 11a(3) of the Revised School Code (RSC) along with Articles 3 and 4 of the parties collective bargaining agreement. The relief requested in both grievances was identical except for the teacher identified, and stated:

> The Association requests that the district recall [teacher] to one of the elementary teaching positions posted on August 13, 2015, for which she is certified and qualified. If, however, at the time of settlement of this grievance, the school year has started and [teacher] has not been recalled to a teaching position, the Association requests that she be made whole to the beginning of the school year, when she would have been placed into one of these positions. This includes lost salary, out of pocket medical expenses due to lost medical insurance benefits, and all other applicable accoutrement of employment.

By letters dated September 18, 2015, the Association was notified by the district's Superintendent, Mark D. Rosenkrans, that the grievances "will not be processed further."

On October 6, 2015, the Association filed a demand for arbitration with the American Arbitration Association (AAA). By letter, dated October 15, 2015, counsel for the district objected to the Association's demand to arbitrate the layoffs and stated:

> The District will not recognize or comply with any determination made by any arbitrator. Furthermore, the pursuing of arbitration on a prohibited subject is contrary to law and itself constitutes an unfair labor practice by the Association. The District will be pursuing an Unfair Labor Practice if this arbitration is not withdrawn by October 23, 2015.

The Association did not withdraw its demand for arbitration and on November 18, 2015, the Employer filed the present proceeding.

Discussion and Conclusions of Law:

The Employer claims in its motion for summary disposition that there is no issue of genuine fact and that it is entitled to judgment as a matter of law. The argument as proffered in support of the motion is very simple and straightforward – the subject of the Association's grievances, the Employer's decision to layoff and not recall either Kimble or Bristol, is a prohibited subject of bargaining and therefore any attempt to arbitrate such is an unfair labor practice under Section 10(2)(d) of PERA.

The Association argues that it is not seeking to arbitrate a prohibited subject of bargaining, rather it claims in its response to the motion that the Employer's failure to recall Kimble or Bristol violated Articles 3 and 4 of the parties' agreement, thereby also violating the Teachers' Tenure Act, both the U.S. and Michigan Constitution, as well as Board Policy 3131, each of which are incorporated by reference in the agreement's aforementioned Articles 3 and 4.

In 1994, the state legislature enacted Public Act 112 (PA 112), which among other things amended Section 15 of PERA by designating nine specific topics as prohibited subjects between a public school employer and a representative of its employees. MCL 423.215(3)(a)-(i). In addressing the newly enacted prohibited subjects, the Court of Appeals stated that the legislature intended "to foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them or that they could ever become part of a collective bargaining agreement." *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). The Court further explained that the subsections "evince a legislative intent to make public school employers solely responsible for these subjects by prohibiting them from being the subjects of enforceable contract provisions and by eliminating any duty to bargain regarding them." *Id.*

In 2011, the legislature enacted Public Act 103 (PA 103), which added several additional prohibited subjects of bargaining within public schools. See MCL 423.215(3)(j)-(p). Subsection 15(3)(k), prohibits bargaining over the layoff and recall of teachers by providing the following:

> 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.

Although prohibited subjects have been in effect since PA 112 was enacted in 1994, it was not until *Pontiac School Dist*, supra, that the Commission addressed the question of whether a party violated PERA by processing a grievance over a prohibited subject to arbitration. In that case, the Commission, relying on *Michigan State AFL-CIO*, held that the union, by attempting to arbitrate the transfer of a teacher, a prohibited subject under Section 15(3)(j) of PERA, had violated Section 10(3)(c) of the Act.[2] The Commission stated there:

> The Union's actions in advancing the Lieberman grievance to arbitration are analogous to insistence on negotiating over prohibited subjects of bargaining

[2] The Commission refused to award attorney's fees or costs as recommended by the administrative law judge in his Decision and Recommended Order stating that Section 16(b) of PERA does not authorize such relief.

> when the other party has repeatedly refused to negotiate those matters... . 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.

At the time the record closed in the present proceeding, the Commission had not yet addressed an argument similar to the one presented herein, that a union is not prohibited from arbitrating a grievance alleging a violation of a statutory or constitutional right incorporated into a collective bargaining agreement even if the subject matter of the grievance inarguably involves a prohibited subject. However, shortly after the record closed, the Commission issued its decision in *Shiawassee, ISD*, supra, which did just that, although in the context of teacher discipline as prohibited under Section 15(3)(m) of PERA.[3] There the Commission stated:

> However, where a grievance stemming from the discipline or 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 § 15(3)(m) to the extent that the grievance concerns a decision by a public school employer related to teacher discipline or discharge.

The Commission, noting that the language of Section 15(3)(m) made "decisions about the development, content, standards, procedures, and adoption" of a school's discipline procedure a prohibited subject of bargaining, concluded that a union's demand to arbitrate over alleged violations of the school board's policies in the discipline of a covered employee served to challenge decisions regarding the implementation of the school's policies regarding employee discipline and therefore was prohibited.

The instant proceeding, like *Shiawassee ISD,* involves the indirect attack of a subject of bargaining made prohibited under Section 15(3) of PERA, through a challenge of incorporated statutes or constitutional rights. Moreover, both Sections 15(3)(k) and 15(3)(m) of the Act contain identical language regarding the "decisions about the development, content, standards, procedures, adoption, and implementation" of each subsection's respective subject.

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[3] Section 15(3)(m) of PERA states:

> 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.

As such there is no reason to conclude that the Commission would consider Section 15(3)(k) any differently than Section 15(3)(m). For this reason, I find that the Association did violate Section 10(2)(d) of PERA by insisting, over the Employer' s objection, on pursuing a grievance over prohibited subjects of bargaining and by demanding to arbitrate that grievance.

I recommend that the Commission grant the Employer's motion for summary disposition and deny the Association's motion, and that it issue the following order:[4]

RECOMMENDED ORDER

The Eaton Education Association/Charlotte Education Association, its officers and agents, are hereby ordered to:

1. Cease and desist from demanding to arbitrate, or insisting on pursuing over the objection of the Charlotte Public Schools, grievances concerning prohibited subjects of bargaining under §15(3)(k) of PERA.

2. Advise the arbitrator that the Association is withdrawing the grievance it filed on October 6, 2015, regarding the layoffs of Angela Kimble and Kris Bristol.

3. Refrain from taking action to enforce any arbitration award which may have been issued pursuant to that grievance prior to the date of this order.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated April 26, 2017

[4] Pursuant to the Commission's decision as issued in *Pontiac Sch Dist*, 28 MPER 34 (2014), I possess no authority to award attorney's fees or costs as requested by Charging Party in this proceeding.

NOTICE TO BARGAINING UNIT MEMBERS

Pursuant to a formal charge brought before the Michigan Employment Relations Commission, the EATON COUNTY EDUCATION ASSOCIATION/CHARLOTTE EDUCATION ASSOCIATION, a labor organization under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act.

Pursuant to the terms of the Commission's order, we hereby notify our bargaining unit members that:

WE WILL

1. Cease and desist from demanding to arbitrate, or insisting on pursuing over the objection of the Charlotte Public Schools, grievances concerning prohibited subjects of bargaining under §15(3)(k) of PERA.

2. Advise the arbitrator that the Association is withdrawing the grievance it filed on October 6, 2015, regarding the layoffs of Angela Kimble and Kris Bristol.

3. Refrain from taking action to enforce any arbitration award which may have been issued pursuant to that grievance prior to the date of this order.

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

EATON COUNTY EDUCATION
ASSOCIATION/CHARLOTTE EDUCATION
ASSOCIATION

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.