STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VAN BUREN EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

MERC Case No. 21-E-1225-CU

-and-

VAN BUREN PUBLIC SCHOOLS,
Public Employer-Charging Party.
_____/

APPEARANCES:

White Schneider, P.C., by Jeffrey S. Donahue and Aubree A. Kugler, for Respondent

Thrun Law Firm, P.C., by Katherine Wolf Broaddus, for Charging Party

DECISION AND ORDER

As a result of the COVID-19 pandemic, Van Buren Public Schools (Employer) directed teachers represented by the Van Buren Education Association, MEA/NEA (Union), to teach students virtually for the 2020-21 school year. Thereafter, the Union filed a grievance on behalf of one of these teachers alleging that during the period in which he was teaching entirely virtually, his total student enrollment entitled him to certain "overage" compensation provided pursuant to Section 7.2.3 of the parties' Agreement. The Employer denied the grievance, and the Union advanced the grievance to arbitration. The Employer responded by filing the instant charge alleging that the grievance implicated a prohibited subject of bargaining under PERA Section 15(3)(h), and that the Union's attempt to arbitrate the grievance violated Section 10(2)(d) of PERA.

In a Decision and Recommended Order[1] Administrative Law Judge (ALJ) Calderwood found that, although the Employer had the authority under Section 15(3) of PERA to implement its virtual teaching mandate for the 2020-21 school year, the Union's grievance did not challenge the implementation of a virtual teaching medium but sought only to enforce negotiated contractual provisions concerning the premium compensation owed for work performed by teachers. Consequently, the ALJ concluded that the Union's attempt to arbitrate the grievance did not violate Section 10(2)(d) of PERA.

[1] MOAHR Hearing Docket No. 21-011037

In its exceptions, the Employer argues that the ALJ erred when he failed to find that the teacher's increased workload (enrollment) was an impact or effect of the decision to use technology to deliver educational programs and services and/or the decision to implement a pilot program. The Employer further contends that the ALJ erred in failing to find that Section 15(3)(h) prohibited the Union from arbitrating a grievance concerning the additional compensation owed to a teacher for the additional workload which it asserts was an impact or effect of the implementation of technology or a pilot program.

The Employer also argues that the ALJ erred when he relied on the Commission's prior decision in *The Professional Personnel of Van Dyke,* 35 MPER 23 (2021) because that decision did not address the impact language contained in Section 15(3)(h) and was, therefore, distinguishable. Lastly, the Employer asserts that the Union's attempt to extend the application of contract language negotiated for in-person teaching to a virtual teaching environment amounts to a subversion of a prohibited bargaining subject.

In its brief in support of the ALJ's decision, the Union initially points out that the record lacks any evidence establishing that the involved teacher's increased workload resulted from, or was caused by, the Employer's implementation of the virtual teaching medium. Accordingly, it argues that there is no evidence upon which to reach the factual conclusion that the teacher's workload was either an "impact" or "effect" of that medium. Next, the Union maintains that the ALJ correctly determined that the grievance did not challenge the right of the Employer either to implement virtual teaching, or to assign the number of students it deemed appropriate to particular teachers but, rather, sought only to enforce the wages owed to the teacher under a contract provision negotiated to address "overage" compensation based on total student enrollment. In that regard, the Union argues that Section 15(3)(h) does not prevent it from seeking wages negotiated pursuant to a collective bargaining agreement for teachers with a virtual workload, particularly where such wages were negotiated independent of the Employer's implementation of the virtual teaching program.

For the reasons set forth below, we adopt the ALJ's Decision and Recommended Order.

Procedural History:

On May 27, 2021, the Employer filed the instant charge alleging that the Union's attempt to advance the grievance involved in this dispute to arbitration implicated a prohibited subject of bargaining under Section 15(3)(h) of PERA and was therefore a violation of Section 10(2)(d) of the Act.

On June 17, 2021, the parties requested that the case be decided on the basis of briefs rather than an evidentiary hearing. Following the submission of briefs, the parties appeared for oral argument on September 8, 2021.

The parties filed post hearing briefs on October 15, 2021. On April 13, 2022, the ALJ issued a Decision and Recommended Order on Motion for Summary Disposition.

On May 3, 2022, the Employer filed exceptions to the ALJ's Decision and Recommended Order and, on May 13, 2022, the Union filed a brief in support of the Administrative Law Judge's Decision and Recommended Order.

Facts[2]:

The Van Buren Education Association, MEA/NEA (Union) represents a bargaining unit of certified teaching staff employed by the Van Buren Public Schools (Employer). The Union and the Employer are subject to a collective bargaining agreement effective from February 10, 2020, through December 31, 2021. Article VII, Section 7.2.3 of the Agreement provides:

> Teachers who have total enrollment of more than 175 students in grades 7-12 (excluding band, choir, physical education & art) will be allowed to apply for Overage Compensation each semester. Teachers who are over this threshold will be compensated $1 per student, per day. Enrollment will be calculated using the class size number from MI-Star. After fall count day if an overage is still occurring, the teacher will be compensated from the date the overage began or occurred at the rate determined by the class enrollment on fall count day. Payments for overages will be made at the February 25th pay and June 25th pay.

Prior to 2020, the Employer did not assign teachers to teach students virtually. Following the onset of the COVID-19 pandemic however, the Employer directed bargaining unit teachers to teach students virtually for the 2020-21 school year. On September 2, 2020, the Union and the Employer entered into a Letter of Understanding that provides:

> In our continuing efforts to allow our students at Belleville High School as many course offerings that we can provide given the current COVID pandemic we are experiencing, VBPS and the VBEA agree that BHS staff who agree to teach students remotely after their regular workday and in excess of their contracted number of hours will be compensated at a rate of $190.00 per student per semester. The class size shall not exceed 50 students, and when possible all staff members who are qualified to teach the course will be offered an opportunity to teach the course. This letter of understanding will sunset at the end of the 2020-2021 school year (June 30, 2021).

[2] The facts are adopted from the ALJ's decision and briefs the parties submitted to the ALJ.

On December 18, 2020, the Union filed a grievance of behalf of teacher Marcus Napthen alleging that his total student enrollment entitled him to Overage Compensation as provided for by Section 7.2.3 of the Agreement.

The grievance states:

> Specifically, Marcus Napthen, a remote English teacher, currently has 231 students in his care without any extra compensation. As mandated in section 7.2.3 of our contract; "Teachers who have total enrollment of more than 175 students in grades 7 – 12 (excluding band, choir, physical education, and art) will be allowed [to] apply for Overage Compensation each semester."
>
> As always, a quick resolution is preferred. Our proposed resolution is that Mr. Napthen is allowed to apply for, and receive, the Overage Compensation for the first semester of the 2020-2021 school year.

Principal Stacey Buhro denied the grievance by email dated January 11, 2021. On January 19, 2021, the Union appealed the grievance to Abdul Maydun, the District's Director of Human Resources. Maydun denied the grievance in writing stating:

> After careful consideration of the facts of this situation, and in conjunction with a discussion with several attorneys, I must respectfully deny this grievance. This subject is a prohibited subject as covered by MCL 423.215 Section 15 which I have provided below:
>
> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> (h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.
>
> It is the District's position that the way we have chosen to implement remote learning is an experimental and/or a pilot program involving the use of technology. That being said it is a prohibited subject. The bargained contract for our "regular" teachers has no bearing on our remote learning program and the contract language you have referenced would have no effect.
>
> In addition, MERC has consistently upheld that ANY subject that is prohibited cannot be arbitrated and Districts have threatened to file an unfair labor practice (ULP) against the union for attempting to do so.

> The Union then appealed the grievance to Superintendent Pete Kudlak on February 8, 2021 and Kudlak likewise denied the grievance via email dated March 8, 2021, noting:
>
> Your Grievance (Mr. Napthen) has been denied as decisions concerning the use of technology to deliver educational programs and services is a prohibited subject of bargaining as covered by MCL 423.215 Section 15.

Following the denial of the grievance by Superintendent Kudlak, the Union indicated its intention to advance the grievance to arbitration.

Discussion and Analysis:

I. Contract Provisions

As noted above, the Union filed the grievance pursuant to Section 7.2.3 of the parties' agreement. The Union asserts that 7.2.3 governs the instant dispute because the negotiated provision generally addresses the premium compensation to be paid a teacher depending on total student enrollment and does not exclude virtual teaching assignments from eligibility for such additional compensation. Conversely, the Employer strenuously urges that Section 7.2.3 was not intended to apply to virtual teaching because the provision was negotiated prior to the COVID-19 pandemic and during a time when no teachers were assigned to teach virtually.

The Employer further asserts that following the onset of the pandemic, the parties negotiated the above-described letter of understanding to address virtual teaching compensation, and it is that letter, and not the provisions of Section 7.2.3, which govern the parties' contract dispute. To that point, the Union responds that the Letter of Understanding cannot apply to the current grievance dispute because it only addresses virtual teaching "after [a teacher's] regular workday and in excess of their contracted number of hours", neither of which was applicable to the virtual teaching performed by Napthen.

All of the foregoing arguments and assertions by the parties involve matters of contract interpretation which should properly be resolved through the parties' negotiated grievance and arbitration machinery under the agreement. *St. Clair County Road Comm'n,* 1992 MERC Lab Op 533, 537-539; *Genesee County Sheriff*, 1992 MERC Lab Op 295, 301-302. It is for an arbitrator, not the Commission, to determine whether the parties intended the "overage compensation" provisions of Section 7.2.3 to apply to virtual teaching assignments. The Union's grievance rests solely on Section 7.2.3. Although the Employer urges that only the Letter of Understanding applies to virtual teaching assignments, the fact remains that if an arbitrator finds Section 7.2.3 inapplicable to teachers who are teaching through a virtual platform, then the Union's grievance will be denied, and the Employer will be relieved of any contractual obligation to pay the compensation sought.

We note that in its brief in support of the ALJ's decision, the Union claims that the ALJ found that Section 7.2.3 applies to both virtual and in-person teaching and, on this basis, it contends that the September 2, 2020 Letter of Understanding applies only to teachers who taught virtually outside of their contracted hours, and not to Napthen. After reviewing the ALJ's decision, we do not believe he made a finding regarding the applicability of Section 7.2.3 to both virtual and in-person teaching, or regarding the applicability of the September 2, 2020 Letter of Understanding to teachers who do not work outside of their contracted hours.

Even had he done so, such a determination would have little bearing on whether the grievance here implicated a prohibited subject. As we noted in *The Professional Personnel of Van Dyke*, 35 MPER 23 (2021):

> However, the Employer's interpretation of Article II, even if correct, does not establish that Grievance 2020-01 implicated a prohibited subject of bargaining. It merely presents an issue of contract interpretation. Even if the Employer's interpretation of Article II is found to be correct, it would only establish that Grievance 2020-01 is an invalid grievance. The determination on such a matter of contract interpretation is properly within the purview of an arbitrator pursuant to the parties' agreed upon contractual grievance resolution process, and not within that of the Commission.

II. Legal Standards

"PERA governs the relationship between public employees and governmental agencies." *Macomb Co. v. AFSCME Council 25,* 494 Mich. 65, 77–78 (2013); *Van Buren Cty. Ed. Ass'n & Decatur Educ. Support Pers. Ass'n, MEA/NEA v. Decatur Pub. Sch.,* 309 Mich. App. 630, 640, (2015). The act imposes upon public employers a mandatory duty to bargain over certain subjects, such as "wages hours, and other terms and conditions of employment…" MCL 423.215(1). A mandatory subject of bargaining is one which has a material or significant impact on "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass'n v Southfield,* 433 Mich. 168, 177; 445 NW2d 98 (1989); *Port Huron Area School District*, 28 MPER 45 (2014). Matters not considered mandatory subjects of bargaining are classified as permissive or prohibited subjects. A permissive subject is one which the parties may bargain by mutual agreement, but on which neither party may insist on bargaining to the point of impasse. *Local 1277, Metropolitan Counsel No. 23, AFSCME AFL-CIO v. Center Line*, 414 Mich 642, 652 (1982). A prohibited subject of bargaining is one that is unlawful under a statute or other law. While parties are not forbidden from discussing a prohibited subject during negotiations, any contract provision containing such a subject is unenforceable. *Mt. Pleasant Public Schs v. Michigan AFSCME Council 25*, 302 Mich App 600, 608 (2013); *Michigan State AFL-CIO v. Michigan Employment Relations Commission*, 212 Mich App 472, 487 (1995), *aff'd* 450 Mich 362, 487 (1996).

The issue of whether a party violates its duty to bargain by seeking to arbitrate a grievance involving a prohibited subject was first addressed by the Commission 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. We further explained in *Ionia, Shiawassee*, and *Pontiac,* that grievance arbitration regarding a prohibited subject of bargaining is a breach of the duty to bargain as it the effort seeks to unlawfully enforce contract provisions or other agreements that have been made unenforceable by Section 15(3) of PERA. See also *Michigan Education Association, MEA/NEA*, 30 MPER 62 (2017), affirmed by *Michigan Education Association v. Vassar Public Scho*ols, 31 MPER 61 (2018).

Section 15 of PERA sets forth certain subjects over which parties are prohibited from bargaining. See *Mt Pleasant Pub Schs v Michigan AFSCME Council 25*, 302, *supra.* "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." MCL 423.215(4). The Court of Appeals has explained that, when the list of prohibited subjects of bargaining found in subsection 3 is read together with subsection 4, 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." *Michigan State AFL-CIO v Michigan Employment Relations Comm*, *supra.*

Relevant to the issue presented in the case before us, Section 15(3)(h) and (4) provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> > (h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.
>
> (4) 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.

The language of Section 15 (3) and (4) is taken from Public Act 112 (PA 112) of 1994. In PA 112, the Legislature narrowed the scope of issues over which a public school employer is required to bargain with the labor organization representing its employees, and made certain decisions and the impact of those decisions "prohibited subjects of bargaining" which are within the sole authority of the public school employer to decide. These prohibited subjects of bargaining,

in addition to decisions concerning use of technology and the impact of those decisions, include 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. MCL 423.215 (3)(a) through (i).

The Court of Appeals upheld the constitutionality of PA 112 in *Michigan State AFL-CIO v Michigan Employment Relations Comm, supra*. The Court held that the legislature's intent was to ensure that a public school employer could not be found guilty of an unfair labor practice by refusing to bargain over the subjects listed in Section 15, and also to prohibit these subjects from becoming part of an enforceable collective bargaining agreement.

Subsequently, as part of a tie-barred legislation package, 2011 PA 103 expanded the list of prohibited subjects of bargaining between public school employers and the bargaining representative of their employees, by adding seven more prohibited subjects, including but not limited to, decisions regarding teacher placement, disciplinary policies and decisions concerning discipline, decisions regarding performance evaluation systems, decisions regarding personnel decisions when conducting staffing reductions, and others. MCL 423.215 (3)(j) through (p)(passed in conjunction with PA 100-102). Despite the sweeping bargaining prohibitions imposed by PA 112 of 1994 and PA 103 of 2011, the subject of wages and teacher compensation remained a permissible subject of bargaining between public school employers and the bargaining representative of their employees.

In *The Professional Personnel of Van Dyke*, *supra,* although the ALJ found that the Union sought "to arbitrate a grievance challenging the school district's decision to assign certain elementary teachers to lunch duty as part of their normal daily schedule," we disagreed finding no basis in the record to support the ALJ's conclusion concerning the subject matter of the grievance. Instead, we held that the stipulated record and explicit language of the grievance established that the issue the Union sought to arbitrate related solely to the compensation owed under the terms of the collective bargaining agreement to teachers assigned to cafeteria duty and that the grievance did not implicate a placement decision. On this basis, we concluded that the Union did not violate Section 10(2)(d) of PERA by pursuing and seeking to arbitrate the grievance.

With respect to the language of Section 15(3)(h) concerning the use and staffing of experimental or pilot programs, and decisions concerning the use of technology, the Commission, in *Grand Haven Public Schools*, 19 MPER 82 (2006), affirmed the ALJ's recommended dismissal of an unfair practice charge alleging that the public school employer violated PERA by refusing to bargain over its implementation of a web page program for teachers. The Commission agreed with the ALJ that the implementation of the web page program constituted a prohibited subjected of bargaining under Section 15(3)(h).

In that case, the respondent school district used its web site to communicate information to the public for various educational and public relations reasons prior to 2002. In the summer of 2002, the school district began an expansion of the web site to increase student/parent involvement

and encouraged individual teachers, on a voluntary basis, to create web pages, and scheduled training on those pages' design and creation. As a result, teachers expressed a variety of concerns. These included whether a teacher's ability to create and maintain a web page would be part of their written evaluation; whether the inability to do so might lead to discipline; and whether, in the event that their web pages provided only basic information, parents might perceive them as less effective or involved than their colleagues with more elaborate pages. Additionally, some teachers expressed concern about the potential extra work involved in creating and updating a web page.

The school district advised the union that it would meet to discuss the teachers' concerns about the program, but it would not bargain about them because it regarded the program as a prohibited subject of bargaining. The union then requested that the district enter into a letter of agreement (LOA) regarding the web page program, which addressed more specifically the implementation of the program, along with matters relating to discipline, evaluations, and indemnification insurance. The LOA did not propose additional wages or compensation. The district refused to sign the proposed LOA.

The ALJ found that individual teacher web pages because they are a tool for communicating important educational information to students and parents, were an "educational program or service" within the meaning of Section 15(3)(h), and that the decision to deliver this service, and the impact of that decision on teachers or the bargaining unit, were prohibited subjects of bargaining under Section 15. The ALJ further found that all of the issues raised in the union's proposed LOA addressed either the decision to provide this service or the impact of the decision on teachers, and that the school district therefore could not be required to bargain over the subjects raised in the LOA, or to enter into a written agreement on these subjects.

In its exceptions to the ALJ's decision, the union argued that the ALJ misinterpreted Sections 15(3)(h) and 15(4) of PERA in finding that the web page program was an "educational program or service" and, therefore, a prohibited subject of bargaining. The union also argued that the ALJ's statutory interpretation was an "impermissible expansion of a clear and unambiguous statute", asserting that the web page program was a mandatory subject of bargaining because it affected wages, hours, and other terms and conditions of employment.

In rejecting the union's exceptions, the Commission agreed that the plain language of the statute established that the phrase, "educational program or service" was not limited solely to the use of technology when instructing students and did apply to respondent's web page program. Consequently, the Commission found that the web page program was a prohibited subject of bargaining left to the discretion of the public school employer to decide. However, the Commission also held:

> We also hold that Respondent is not required to bargain over the web page program or enter into a written agreement on this subject, because participation in the program was voluntary. Creation of the web page program does not constitute a mandatory subject of bargaining as Respondent did not alter the wages, hours, or

> terms or conditions of employment of members of Charging Party's bargaining unit through the implementation or attempted implementation of this voluntary program. Nothing in the record indicates that Respondent changed its criteria for evaluating employees based on participation in the web page program. As a result, Respondent did not commit an unfair labor practice by refusing to bargain over its implementation.

Implicit in the Commission's decision therefore is that an employer may still be required to bargain over other mandatory subjects of bargaining such as wages and hours, even if those subjects are impacted as the result of an employer action which is deemed a prohibited subject of bargaining.

III. Whether the Grievance Involved a Prohibited Subject

As noted previously, the Employer instructed bargaining unit teachers, including Marcus Napthen, to teach students virtually during the 2020-21 school year. There is no dispute that Napthen was assigned to teach more than 175 students during the fall semester.

The grievance filed by the Union on Napthen's behalf challenges neither the decision of the Employer to implement the virtual teaching program, nor the technology to be used for such teaching. Likewise, the grievance does not contest the number of students assigned to Napthen as a virtual teacher. In other words, the grievance does not challenge or seek to bargain over the teacher's workload. Rather, the grievance asserts that the Employer violated the agreement by failing to pay the negotiated added compensation owed to Napthen because he was assigned more than 175 students.

The Employer's argument rests on the initial assertion that Napthen's increased workload was an impact or effect of its decision to use technology to deliver educational programs and services and/or its decision to implement a pilot program. The Employer then argues that since the "overage compensation" provision of Section 7.3.2 of the Agreement was based on the total number of students assigned a teacher, that any attempt to enforce the compensation provision also implicates a prohibited subject of bargaining because of its relation to a virtual teacher's "workload". As such, the Employer contends that Section 15(3)(h) both prohibits the parties from bargaining over the additional compensation due a teacher as a result of the increased workload caused by the implementation of technology or a pilot program and prohibits the Union from arbitrating a grievance concerning the same.

Conversely, the Union argues that the record is insufficient to warrant the conclusion that either Napthen's workload or increased workload, was an impact of the implementation of virtual teaching. The Union notes further that the record is devoid of any evidence that either overall student enrollment, or the number of students assigned to Napthen, increased as a result of the implementation of the virtual learning platform.

The Union also argues that Section 15(3)(h) does not prevent it from enforcing the compensation amount to be paid pursuant to a collective bargaining agreement for teachers with a particular workload, regardless of whether they are teaching students virtually. In that regard, the Union points out that the contract provision at issue, Section 7.3.2, was not negotiated in response to the virtual teaching platform, and therefore involves a wage provision negotiated independent of any prohibited subject of bargaining. Since wages and compensation are not prohibited subjects under either PA 112 or PA 103, the Union maintains that its attempt to arbitrate the instant grievance did not constitute unlawful bargaining conduct.

We find no merit in the Employer's exceptions. First, whether the record is sufficient to support a conclusion that the virtual classroom constitutes a pilot program or the use of technology to implement teaching services, we find that no prohibited subjects were involved because, under the facts presented in this matter, the School District has not established that either the teacher's increased "workload", or the wages to be paid for such workload, are an "impact" of the virtual teaching program.

Section 15(3)(h) prohibits bargaining over a public school's decision to use technology or implement a pilot program, including directives given to teachers relating the implementation of these matters, as well as over the "impact" of such decisions. Merriam-Webster's dictionary and Dictionary.com define the word "impact" as "to have a direct effect on". Synonyms include the word "influence". In other words, to prevail in its argument, the Employer must be able to demonstrate that its virtual teaching program had a direct effect on, or caused, the resulting teaching workload of Napthen.

We agree with the Union that there is no evidence in the record to support the conclusion that the number of enrolled students under the involved teacher's instruction was an "impact" of the Employer's virtual learning program. Nothing in the record establishes that Napthen's increased workload was an impact of the Employer's implementation of virtual education as opposed to the result of some other factor such as attrition or changes in enrollment. Significantly, there is no evidence that any other teacher had an increased workload as a result of the Employer's decision to implement a virtual teaching program. Indeed, there is no evidence whatsoever of any connection between the virtual teaching program and student enrollment, or a particular teacher or teachers' workload.

Further, as noted above, the Union did not file the grievance over the Employer's implementation of the "virtual" classroom, or the resulting workload carried by the involved teacher performing his virtual teaching duties. The Union did not grieve the assignment of such work, or the required use of technology to deliver teaching services. Moreover, unlike in *Grand Haven Public Schools*, the Union here did not seek to bargain any adjustments to the virtual teaching platform. To the contrary, the negotiated language upon which the Union relies in its grievance existed prior to the implementation of the virtual teaching platform, which means that the parties recognized the possibility of a teacher having more than 175 students unrelated to whether virtual teaching was a part of the equation. Accordingly, we find insufficient evidence to

support the conclusion that the teacher's increased workload was an impact of the virtual learning platform.

Additionally, it should be noted that the Union did not file the grievance in reliance on the parties' Letter of Understanding dated September 2, 2020, which was negotiated specifically to deal with virtual teaching, albeit "after hours". Rather, the Union filed the grievance under previously negotiated contract language which addresses a compensation bonus tied strictly to the number of enrolled students to be taught by the involved teacher. That contract provision does not distinguish between virtual and non-virtual teaching. The negotiation of that language did not implicate a prohibited subject, and, if the situation here involved non-virtual teaching, the Employer would have no argument that a prohibited subject was implicated.[3]

We find that the Employer failed to support its assertion that Napthen's workload increased as a result or "impact" of its implementation of virtual teaching. Accordingly, we find that the Employer has failed to produce evidence to support a determination that the grievance over which the Union demanded arbitration involved either the Employer's decision to implement the virtual teaching platform, or the impact of such a decision.

Although not necessary to our decision, assuming there existed evidence that the teacher's increased workload was an impact of the implementation of the virtual teaching program, we would make the following observations:

The legislature made the conscious decision to exclude wages from the laundry list of terms of employment deemed prohibited subjects of bargaining under both PA 112 and PA 103. The Union is seeking to enforce an independent contract provision negotiated over the wages to be paid depending on student enrollment as it relates to the number of students to which a teacher is assigned. There is no distinction made in that provision between virtual and non-virtual teaching, and no basis upon which to conclude that the negotiated language resulted from the implementation of the virtual teaching program. Indeed, as noted above, there is no piece of that negotiated provision which implicates a prohibited subject.

Although our predecessors on the Commission, along with the Courts, have interpreted certain provisions of Section 15(3) broadly, they did so in the context of analyzing the scope of prohibited subjects of bargaining. *See, e.g., Shiawassee Intermediate Sch* Dist, 30 MPER 13 (2016) (discipline); *Pontiac Sch Dist*, 28 MPER 1 (2014) (teacher layoff and recall). Wages, however, are not a prohibited subject of bargaining. We find little support for the proposition that the legislature intended that a permissible subject of bargaining should be converted to a prohibited subject of bargaining merely because a union's attempt to enforce a contract provision addressing that permissible subject arises tangentially in the context of an arguable pilot program or use of technology.

[3] The Employer did not take the position that the Letter of Understanding, which was specifically negotiated in conjunction with the implementation of the virtual teaching platform, implicated a prohibited subject of bargaining and should, therefore, also be deemed unenforceable.

Particularly as it relates to wages, which are one of the most significant terms of employment, to arrive at the incongruous determination that the wages owed under previously negotiated contract language are an impact of an unrelated decision involving a prohibited subject, seems to us to turn the legislation on its head and impose a result not intended by the legislature.

Accordingly, we adopt the ALJ's decision in its entirety and find that the Union's enforcement of Section 7.2.3 of the Agreement through grievance arbitration did not constitute an effort to unlawfully enforce a contract provision or other agreement that has been made unenforceable by Section 15(3) of PERA, and therefore, did not implicate a prohibited subject of bargaining.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's Decision and Recommended Order dismissing the charge, and find, consistent with the ALJ, that the Union did not violate 10(2)(d) of PERA.

ORDER

The Decision and Recommended Order of the Administrative Law Judge is affirmed and adopted in its entirety as our final Order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: June 17, 2022

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

VAN BUREN EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent.

Case No. 21-E-1225-CU
Docket No. 21-011037-MERC

-and-

VAN BUREN PUBLIC SCHOOLS,
Public Employer-Charging Party.

_____/

APPEARANCES:

White Schneider, PC, by Jeffrey S. Donahue and Aubree A. Kugler, for the Labor Organization

Thrun Law Firm, P.C., by Katherine Wolf Broaddus, for the Public Employer

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

On May 27, 2021, the Van Buren Public Schools (Employer or Charging Party) filed the above captioned unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against the Van Buren Education Association, MEA/NEA (Union or Respondent). 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 Travis Calderwood, Administrative Law Judge for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission).

Unfair Labor Practice and Procedural History:

The District's charge alleges that the Union's attempt to advance a grievance to arbitration under the parties' contract is predicated on a prohibited subject of bargaining pursuant to Section 15(3)(h) PERA and therefore violates Section 10(2)(d) of the Act.

This matter was initially scheduled to be heard on July 16, 2021. On June 17, 2021, the parties made a joint request to have the hearing adjourned and instead submit this matter to the undersigned to be decided by briefs. Following agreement of a briefing schedule and receipt of said filings, the parties appeared for oral argument on September 8, 2021. Post hearing briefs were filed by the parties on October 15, 2021. Accordingly, pursuant to the filings submitted in

this matter and the transcript of the September 8, 2021, oral argument, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

The relevant and operative facts necessary to decide this matter are not in dispute and are summarized herein.

The parties are signatories to a collective bargaining agreement effective for the 2020-2021 school year covering a bargaining unit that includes the District's certified teaching staff. Relevant to this proceeding, Article 7.2.3 of that contract provides:

> Teachers who have total enrollment of more than 175 students in grades 7-12 (excluding band, choir, physical education & art) will be allowed to apply for Overage Compensation each semester. Teachers who are over this threshold will be compensated $1 per student, per day. Enrollment will be calculated using the class size number from MI-Star. After fall count day if an overage is still occurring, the teacher will be compensated from the date the overage began or occurred at the rate determined by the class enrollment on fall count day. Payments for overages will be made at the February 25th pay and June 25th pay.

Prior to the onset of the March 2020 COVID-19 pandemic, the District did not assign teachers to teach students virtually. However, due to the COVID-19 pandemic, an increased number of students elected virtual instruction over in-person instruction resulting in the District assigning bargaining unit teachers to teach students virtually for the 2020-21 school year. The Union and the District reached an agreement regarding the provision of virtual instruction by teachers for the 2020-21 school year which provided:

> In our continuing efforts to allow our students at Belleville High School as many course offerings that we can provide given the current COVID pandemic we are experiencing, VBPS and the VBEA agree that BHS staff who agree to teach students remotely after their regular workday and in excess of their contracted number of hours will be compensated at a rate of $190.00 per student per semester. The class size shall not exceed 50 students, and when possible all staff members who are qualified to teach the course will be offered an opportunity to teach the course. This letter of understanding will sunset at the end of the 2020-2021 school year (June 30, 2021).

On December 18, 2020, the Union filed a grievance of behalf of bargaining unit member Marcus Napthen alleging his caseload as a virtual teacher violated Section 7 of the Master Agreement. The grievance, as initially filed states in the relevant portion the following:

> Specifically, Marcus Napthen, a remote English teacher, currently has 231 students in his care without any extra compensation. As mandated in section 7.2.3 of our contract; "Teachers who have total enrollment of more than 175 students in grades 7 – 12 (excluding band, choir, physical education, and art) will be allowed [to] apply for Overage Compensation each semester."
>
> As always, a quick resolution is preferred. Our proposed resolution is that Mr. Napthen is allowed to apply for, and receive, the Overage Compensation for the first semester of the 2020-2021 school year.

The District readily admits that Napthen was assigned to teach more than 175 students during the fall semester of the 2020-2021 school year. There is no indication that Napthen was assigned any in-person students at all times relevant to this proceeding. Likewise, there is no indication that Napthen complained regarding the number of students assigned to him prior to the grievance's filing. The grievance's requested remedy was to allow Napthen to "apply for, and receive, the Overage Compensation for the first semester of the 2020-2021 school year." The record does not indicate that the Union at any time sought to challenge the assignment of 175 students to Napthen.

The District, through Highschool Principal Stacey Buhro, denied the grievance without explanation in an email dated January 11, 2021. On January 19, 2021, the Union advanced the grievance to Abdul Maydun, the District's Director of Human Resources. Maydun, in a written response, also denied the grievance. That response stated in its entirety, the following:

> After careful consideration of the facts of this situation, and in conjunction with a discussion with several attorneys, I must respectfully deny this grievance. This subject is a prohibited subject as covered by MCL 423.215 Section 15 which I have provided below:
>
> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> (h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.
>
> It is the District's position that the way we have chosen to implement remote learning is an experimental and/or a pilot program involving the use of technology. That being said it is a prohibited subject. The bargained contract for our "regular" teachers have no bearing on our remote learning program and the contract language you have referenced would have no effect.
>
> In addition, MERC has consistently upheld that ANY subject that is prohibited cannot be arbitrated and Districts have threatened to file an unfair labor practice (ULP) against the union for attempting to do so.

The Union next filed the grievance with the District's Superintendent, Pete Kudlak, on February 8, 2021. On March 8, 2021, by email, Superintendent Kudlak also denied the grievance, writing:

> Your Grievance (Mr. Napthen) has been denied as decisions concerning the use of technology to deliver educational programs and services is a prohibited subject of bargaining as covered by MCL 423.215 Section 15.

Following the denial of the grievance with the Superintendent the Union indicated its intention to advance the grievance to arbitration. The District responded by filing the present charge.

Discussion and Conclusions of Law:

Section 15 of PERA clearly and explicitly imposes upon public employers a mandatory duty to bargain over certain subjects, such as "wages, hours, and other terms and conditions of employment..." MCL 423.215(1). While the Act requires bargaining on some subjects, beginning in 1994, Section 15(3) sets forth certain subjects that public school employers and bargaining representatives are prohibited from bargaining. See *Mt Pleasant Pub Schs v Michigan AFSCME Council 25*, 302 Mich App 600, 608-609 (2013). "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." MCL 423.215(4). Our Court of Appeals has explained that, when the list of prohibited subjects of bargaining found in subsection 3 is read together with subsection 4, 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." See *Michigan State AFL-CIO v Michigan Employment Relations Comm*, 212 Mich App 472, 487 (1995). As argued to by the parties, relevant to the present dispute, Section 15(3)(h) includes as prohibited the following:

> Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.

The Commission, through several cases, has clearly determined that a party violates its duty to bargain by seeking to arbitrate a grievance over a prohibited subject of bargaining. See *Pontiac Sch Dist*, 28 MPER 34 (2014); *Ionia Co Intermediate Ed Assn*, 30 MPER 18 (2016); and *Shiawassee Intermediate Sch Dist Ed Assn*, 30 MPER 13 (2016). As the Commission explained in those cases, 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 Section 15(3) of PERA and is a breach of the duty to bargain. See also *Michigan Education Association, MEA/NEA*, 30 MPER 62 (2017), affirmed by Michigan *Education Association v. Vassar Public Schools*, 31 MPER 61 (2018).

Very recently, in *The Professional Personnel of Van Dyke,* 35 MPER 23 (2021), the Commission considered whether a grievance seeking to enforce an extra-duty compensation contract clause for several teachers scheduled to supervise cafeteria periods through the parties' grievance and arbitration procedure implicated a prohibited subject under Section 15(3)(j) of the Act. In that case, the school district was not able to schedule elementary enrichment teachers with enough classes to fill a 1.0 FTE schedule due to declining enrollment. As a result, certain enrichment teachers were assigned to lunchroom supervision duties to fill out the remainder of their schedule. Initially, the union demanded that the school district bargain about the assignment of staff, asserting that professionals should not be required to engage in lunchroom supervision. While the parties discussed the issue, they did not reach an agreement. In response to the union's stated intention to seek mediation, the school district took the position that assignment to the cafeteria as a placement issue that was not a subject to bargaining pursuant to Section 15(3)(j). The union ultimately abandoned its effort to bargain over the assignment of teachers to the cafeteria and instead focused on seeking the enforcement of a contractual provision that provided for extra-duty compensation for "[t]eachers working cafeteria duty…" The union filed a grievance in which it didn't challenge the assignment and instead requested that those affected teachers be compensated under the extra-duty provision. The school district denied the grievance and argued that furthering the issue would amount to an unfair labor practice charge. The union submitted the issue for arbitration and the school district filed the charge.

The Commission in *The Professional Personnel of Van Dyke,* undertook an analysis to determine whether the subject matter of the grievance implicated section 15(3)(j) of the Act. The Commission first noted that the union's grievance it sought to arbitrate did not challenge the school district's authority to make the assignments. Instead, the Commission focused on the fact that "the stipulated record and explicit language of the grievance establish that the issue the Union sought to arbitrate related solely to the compensation owed under the terms of the collective bargaining agreement to teachers assigned to cafeteria duty." *Id.* The Commission went on to consider whether the contractual provision the union sought to enforce through arbitration implicated Section 15(3)(j) or any other prohibited subject, stating:

> Specifically, Article II, Subsection 5 delineates the additional compensation due a teacher who is assigned cafeteria duty. It does not involve teacher placement, or any other prohibited subject of bargaining and is an enforceable part of the collective bargaining agreement. As such, an attempt to enforce Article II, Subsection 5 through grievance arbitration would not constitute an effort to unlawfully enforce a contract provision or other agreement that has been made unenforceable by Section 15(3) of PERA. Stated differently, Grievance 2020-01 does not attempt to obtain a contract right or benefit that could not itself be bargained. [internal citations omitted]

I note that the Commission, in holding that the grievance did not implicate a prohibited subject of bargaining, did not focus nor address the "impact" language of statute.

Applying the Commission's rationale and reasoning from *The Professional Personnel of Van Dyke* to the present dispute appears wholly appropriate given the similarities between the two cases. In both situations, the school districts exercised their unfettered and unilateral

authority under Section 15(3) of PERA to act within a specific sphere, the assignment of teachers and pilot programs and/or the use of technology and staffing, respectively. In neither case does the union appear to be challenging the decisions of the employer, rather, in both cases, the unions are attempting to enforce stand-alone contractual provisions, i.e., compensation matters related to work performed by teachers. Accordingly, consistent with the Commission's holding in *The Professional Personnel of Van Dyke,* I find that the Union's grievance herein and its attempt to arbitrate the same, seeking to enforce Article 7.2.3 of the contract relative to Napthen, does not violate Section 10(2)(d) of PERA.

I have considered all other arguments as set forth by the parties and conclude such does not warrant any changes to my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: April 13, 2022