STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UTICA EDUCATION ASSOCIATION,
Labor Organization-Respondent, Case No. 20-C-0525-CU

-and-

UTICA COMMUNITY SCHOOLS,
Public Employer-Charging Party.
_____/

APPEARANCES:

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

Collins & Blaha, P.C., by Gary J. Collins and John C. Kava, for the Public Employer

DECISION AND ORDER

On March 31, 2021, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charge and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

Robert S. LaBrant, Commission Member

Issued: May 21, 2021

William F. Young, Commission Member

[1] MOAHR Hearing Docket No. 20-005229

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

In the Matter of:

UTICA EDUCATION ASSOCIATION,
Respondent-Labor Organization,

Case No. 20-C-0525-CU;
Docket No. 20-005229-MERC

-and-

UTICA COMMUNITY SCHOOLS,
Charging Party-Public Employer.

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APPEARANCES:

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed by the Utica Community Schools against the Utica Education 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, the case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission).

The Unfair Labor Practice Charges and Procedural Background:

The unfair labor practice charge, which was filed by the Utica Community Schools on March 3, 2020, asserts that the Utica Education Association violated PERA by demanding to arbitrate a grievance concerning teacher discipline, a prohibited subject of bargaining under § 15(3)(m) of the Act, MCL 423.215(3)(m). The charge was originally assigned to ALJ Travis Calderwood and a hearing was scheduled for April 16, 2020. The hearing was subsequently adjourned without date at the request of the parties.

On May 1, 2020, ALJ Calderwood held a conference call during which he disclosed to the parties that he was previously employed by Collins & Blaha, P.C., the law firm which represents the School District. On June 16, 2020, the Union filed a motion seeking Judge

Calderwood's recusal. ALJ Calderwood granted the motion in an order entered on June 17, 2020, and the case was transferred to the undersigned.

I held a prehearing conference with the parties on July 25, 2020. Thereafter, the Union filed a motion to dismiss the charge on summary disposition. The school district filed a timely response to the Union's motion on July 27, 2020. Oral argument was held on the motion on August 20, 2020, following which the parties subsequently filed supplemental briefs.

Findings of Fact:

The underlying facts are not in dispute. Kristin Oprita is employed by Utica Community Schools as a teacher at Eisenhower High School (EHS) and is a member of a bargaining unit represented by the Utica Education Association (UEA), an affiliate of the Michigan Education Association (MEA). On May 17, 2019, the School District placed Oprita on a one-week administrative leave pending the results of an investigation into alleged misconduct. At the conclusion of the investigation, the District suspended Oprita for two days without pay.

On September 3, 2019, the Union filed Grievance #19-9 challenging the School District's decision to place Oprita on administrative leave. The grievance asserted that the School District denied Oprita due process by instructing her to go home immediately and speak to no one, and by refusing to provide Oprita with the identity of the complainant or any information concerning the alleged violation. As a remedy, the grievance sought the removal of disciplinary letters from Oprita's personnel file and restoration to her teaching assignment.

At or around the same time, the Union filed Grievance #19-10 which similarly asserted that Oprita had been denied due process, including her right to information concerning the charges against her and an opportunity to provide a response to the allegations. According to the grievance, Michael Sturm, Assistant Superintendent of Schools, admonished Oprita during a disciplinary meeting for "what he perceived as a violation of her professional responsibilities." The grievance further asserted that representatives of the School District leveled threats against Oprita "which seemed intended to prevent her from exercising her rights under the contract" and that Oprita was placed under a strict "gag" order until the end of the school year. As relief, Grievance 19-10 sought removal of discipline from Oprita's file, written acknowledgement of contractual violations, restoration of the loss of pay for the two-day suspension and reinstatement to her teaching assignment.

Following a Step 3 hearing, the School District denied the grievances in separate letters, both issued on November 15, 2019. In those letters, the School District concluded that Oprita had been provided full due process and that there had not been any violation of the collective bargaining agreement. In addition, the District asserted that the remedial relief requested by the Union implicated prohibited subjects of bargaining under §§ 15(3) (j) and (m) of PERA.

On or about November 20, 2019, the Union filed a demand for arbitration of the grievances relating to Oprita which stated, in pertinent part:

> Grievant was placed on administrative leave without being told the reason for 11 days. She was not told who entered the complaint against her. She was also told to speak to no one. During a disciplinary meeting, she was not told the identity of the accuser. She has never been told the complainant's name. She was not given an open, unprejudiced and fair opportunity to enter her explanation. The administrator made serious threats that seemed intended to prevent her from enforcing her rights under the contract. She was placed under a gag order. She was suspended without pay for 2 days.
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> * * *
>
> Remedy Sought:
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> Removal of discipline letters from teacher's file, written acknowledgement of contractual violations, restoration of two-day pay loss and reinstatement to teaching assignment at Eisenhower High School.

By letter to the MEA general counsel dated December 20, 2019, the School District asserted that the grievances implicated prohibited subjects of bargaining under PERA and, therefore, the Union's demand for arbitration constituted a violation of the Act. In the letter, the School District cited the Commission's prior decisions in *Shiawassee ISD*, 30 MERC Lab Op 13 (2017) and *Ionia County ISD*, 30 MPER 18 (2016), for the proposition that the issue of due process in disciplinary procedures is a prohibited subject of bargaining under § 15(3)(m) of the Act. The School District requested that the Union rescind its demand for arbitration.

Counsel for the Union responded to the School District in writing on or about February 10, 2020. The Union denied that its demand for arbitration implicated a prohibited subject of bargaining and continued to assert that Oprita had been denied due process.

Mark J. Glazer was appointed by the American Arbitration Association (AAA) to arbitrate the dispute. Although the School District sent a letter to the arbitrator requesting that the matter be dismissed because it involved discipline, a prohibited subject of bargaining, neither party asked Glazer to put the arbitration on hold so that the Commission could first issue a decision on the instant charge.

On March 13, 2020, arbitrator Glazer issued an interim award concluding that he lacked jurisdiction over this case insofar as it pertains to discipline. Rather than dismiss the matter entirely, however, Glazer requested that the parties provide additional information so that he could determine whether there were any "contractual issues beyond discipline that are properly considered in arbitration."

In a letter dated March 23, 2020, the Union requested that Glazer "retain jurisdiction and offer dates for arbitration to the parties as soon as possible." While conceding that the grievances, as originally filed, did indeed address issues relating to discipline, the Union

asserted that it had since narrowed the subject matter of the dispute by clarifying that the grievances did not pertain to the School District's decision to discipline Ms. Oprita, but rather alleged "serious violations of the parties' collective bargaining agreement." At no point, however, did the Union rescind, amend or otherwise modify the remedy requested in the demand for arbitration.

On April 14, 2020, the arbitrator issued a final award concluding that the matter related to prohibited subjects of bargaining because the grievances were protesting the School District's decision to discipline Oprita, as well as collateral and due process issues relating to that discipline. With respect to the Union's assertion that the grievances were not about discipline but instead pertained to violations of the collective bargaining agreement, the arbitrator determined that such claims were not arbitrable because they had not been raised on or before the third step of the grievance procedure as required by the parties' contract.

The Union filed a motion for reconsideration of the arbitrator's decision. Thereafter, the parties agreed to put the instant unfair labor practice proceeding on hold pending resolution of the motion for reconsideration. In an order issued on May 8, 2020, Glazer denied the Union's motion.

Discussion and Conclusions of Law:

Charging Party contends that the Union violated PERA by seeking to arbitrate grievances pertaining to the discipline of Oprita, a member of the UEA bargaining unit. According to the School District, employee discipline, including the issue of due process in disciplinary procedures, constitutes a prohibited subject of bargaining under § 15(3)(m) of PERA.

Under § 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. The scope of bargainable issues was significantly narrowed by the Legislature in 1994 with the passage of Public Act 112 (PA 112), which made certain decisions by a public school employer prohibited subjects of bargaining. Those decisions, as set forth in § 15(3) of the Act, 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. Although PA 112 did not define the term "prohibited subject," the Court of Appeals concluded that the Legislature's intent was to foreclose the possibility that a school district could be found to have committed an unfair labor practice by refusing to bargain over a prohibited topic or that a prohibited topic could become part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996). Thus, PA 112 essentially created an exception to the general rule requiring a public employer to bargain over terms and conditions of employment. Because grievance arbitration is an extension of the collective bargaining process, a labor organization representing public school employees violates § 10(2)(d) of PERA by seeking arbitration of a grievance pertaining to a prohibited subject of bargaining. *Pontiac Sch Dist*, 28 MERC Lab Op 34 (2014); *Shiawassee ISD*, 30 MERC Lab Op 13 (2017).

The Legislature added to the list of prohibited subjects of bargaining in in 2011 with the passage of Public Act 103 (PA 103). With the 2011 amendments, § 15(4) of PERA now provides that the matters set forth in Section 15(3) are "within the sole authority of the public school employer to decide." Among the new sections added to PERA by PA 103 was § 15(3)(m), which reads as follows:

> For public employees whose employment is regulated 1937 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 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 PA 4, MCL 38.101.

Since the enactment of PA 103, the Commission and the courts have interpreted Section 15(3)(m) broadly, concluding that the plain language of the statute gives public school employers broad discretion to make decisions concerning teacher discipline. For example, in *Shiawassee ISD*, supra, the school district issued a two-day disciplinary suspension to a teacher. The union grieved the suspension, asserting that the employer violated certain provisions of the parties' collective bargaining agreement, as well as the teacher's *Weingarten* rights.[1] As a remedy, the union sought to have the discipline rescinded and the teacher made whole. The school district denied the grievance, asserting that that it involved a prohibited subject of bargaining under § 15 (3)(m) of PERA. When the union advanced the grievance to arbitration, the employer filed an unfair labor practice charge alleging that the union had violated § 10(2)(d) of the Act and its duty to bargain by insisting, over the employer's objection, to bargain over a prohibited subject. The ALJ found merit to the charge, concluding that § 15(3)(m) was intended to ensure that teacher discipline and any topic related to it be removed from the realm of collective bargaining.

On exception, the union asserted that the ALJ's decision was erroneous because the grievance at issue alleged that the school district had violated statutory and contractual rights unrelated to discipline, including due process provisions contained in the parties' agreement. The Commission affirmed the ALJ, concluding that the language of § 15(3)(m) is not limited to decisions concerning whether an employee should be disciplined or discharged, but also covers substantive or procedural decisions related to the discharge or discipline of individual employees and decisions regarding the procedures set forth in an employer's policy regarding discipline and discharge. The Commission also explicitly rejected the union's contention that arbitration of a grievance alleging a violation of a teacher's due process rights

[1] In *NLRB v Weingarten, Inc*, 420 US 251 (1975), the National Labor Relations Board (NLRB) recognized that an employee has the right, upon request, to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to discipline. The Commission has adopted the Board's reasoning in cases arising under PERA. See e.g. *Univ of Michigan*, 1977 MERC Lab Op 496.

is permissible under § 15(3)(m). While recognizing that statutory or constitutional rights are still enforceable in other forums, the Commission held that a public school employer's policies relating to discipline or discharge are not contractually enforceable.

The Commission reached a similar conclusion in *Ionia County ISD*, 30 MPER 18. In *Ionia*, the union attempted to arbitrate a grievance challenging the school district's decision to issue a written reprimand to a teacher in its bargaining unit. The grievance asserted that the discipline was arbitrary because the teacher was denied due process during the employer's investigation. As a remedy, the grievance sought to have the discipline reduced to a verbal warning in writing. The employer filed an unfair labor practice charge, asserting that the subject matter of the grievance was a prohibited subject of bargaining under § 15(3)(m). The ALJ granted summary disposition in favor of the school district, concluding that the Legislature had intended to remove all topics relating to discipline, including disciplinary procedures and disciplinary due process, from the sphere of collective bargaining. The Commission agreed with the ALJ and held that by continuing to seek review of whether the disciplinary procedure implemented by the school district denied due process to the teacher, the union was seeking arbitration regarding a prohibited subject in violation of § 10(2)(d) of the Act. The Commission's decision was subsequently affirmed by the Court of Appeals in *Ionia County Intermediate Ed Ass'n v Ionia County ISD*, (unpublished opinion per curiam of the Court of Appeals, decided February 22, 2018, Docket No. 334573.

The Union argues that regardless of whether the Oprita grievances implicated a prohibited subject of bargaining under § 15(3)(m), the unfair labor practice charge filed by the School District in this matter has been rendered moot by virtue of the final and binding decision of the arbitrator dismissing the grievances for lack of jurisdiction.

"Mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome,'" *Michigan Chiropractic Council v Comm'r of Ins*, 475 Mich 363, 371 n 15 (2006) (opinion of Young, J.), quoting *Los Angeles Co v Davis*, 440 US 625, 631 (1979) (internal citations omitted), or where a subsequent event renders it impossible to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003). See also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112-113 (2002), clarified in part in *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470-472 (2006); *People v Cathey*, 261 Mich App 506, 510 (2004); *Mead v Batchlor*, 435 Mich 480, 486 (1990). Mootness is a question which may be raised at any time. *Michigan Chiropractic Council*, supra. An otherwise moot issue may be reviewed if it is deemed to be of public significance and is expected to recur while simultaneously likely to evade judicial review. *Wayne County Int Sch Dist*, 1993 MERC Lab Op 317, 324; *Jackson Community Coll*, 1989 MERC Lab Op 913. See also *City of Warren v Detroit*, 261 Mich App 165 (2004); *Whitman v Mercy-Memorial Hosp*, 128 Mich App 155 (1983).

The Employer contends that the Union's mootness defense should be rejected because the allegations set forth in the charge are of significant concern to the public. I disagree. This is not a case of first impression, nor does this matter present any questions of significant public policy. To the contrary, the underlying issue raised by the charge is now a matter of well-settled law. As noted above, the Commission has repeatedly held that provisions in a collective bargaining agreement, including those which incorporate due

process and other constitutional or statutory rights, are unenforceable to the extent that they implicate a public school employer's decision to discipline or discharge a teacher. Thus, it is now a matter of black letter law that a union violates § 10(2)(d) by continuing to seek review of whether a public school employer's disciplinary procedure violates a teacher's right to due process. *Ionia County Intermediate Ed Ass'n*,; *Shiawassee ISD*. See also *Howell Ed Ass'n*, 30 MPER 29 (2016). The instant case simply does not raise any matters of continuing public concern.

I also reject the Employer's contention that this issue is capable of repetition yet evade Commission review. The School District argues that if this case is dismissed as moot, it will be forced to repeatedly defend itself in arbitration without there being an opportunity for the Commission to make a determination regarding whether a topic constitutes a prohibited subject of bargaining under the Act. According to the Employer, arbitrators will "not hesitate to exercise authority" in matters over which they likely do not have jurisdiction, thereby depriving the Commission of its exclusive jurisdiction over matters governed by PERA. I find this argument unconvincing. It is not uncommon for arbitrators to place matters on hold when there is a case pending before the Commission involving the interpretation of the Act. In fact, a prior grievance arbitration was put on hold at the request of these same parties so that the Commission could first decide whether a particular grievance implicated a prohibited subject of bargaining. *Utica Community Schools*, 32 MPER 36 (2019). In the instant case, however, the School District never asked arbitrator Glazer to put the arbitration on hold. To the contrary, the parties both agreed to have this proceeding held in abeyance while Glazer reviewed the union's motion for reconsideration. For these reasons, I conclude that the Employer has not demonstrated that this issue is likely to recur yet evade review.

In *Pontiac Sch Dist*, *supra*, the Commission held that it lacks the authority to order a union to reimburse an employer for costs and attorney fees incurred as a result of the arbitration of a grievance filed in violation of § 10(2)(d) of PERA. See also *Goolsby v Detroit*, 211 Mich App 214, 224 (1995). Accordingly, the arbitrator's decision dismissing the grievances in this matter substantially removes any effective remedy beyond a cease and desist order and notice posting. Given that the conduct complained of in this matter does not raise any important questions of public interest and is not likely to reoccur, I find that the allegations in the charge have been rendered moot. *City of Lansing*, 29 MPER 63 (2016) (no exceptions); *Van Dyke Public Schools*, 29 MPER 32 (2015) (no exceptions); *Traverse Bay ISD*, 28 MPER 59 (2014); *Kalamazoo Pub Lib*, 1994 MERC Lab Op 486 (no exceptions); *City of Saginaw*, 1984 MERC Lab Op 104; *Saginaw Ed Ass n*, 1982 MERC Lab Op 100, 105 (no exceptions).

In accordance with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by Utica Community Schools against the Utica Education Association in Case No. 20-C-0525-CU; Docket No. 20-005229-MERC is hereby dismissed in its entirety on summary disposition.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: March 31, 2021