STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HOPKINS PUBLIC SCHOOLS,
Public Employer-Respondent,

MERC Case No. 21-A-0196-CE

-and-

HOPKINS EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Clark Hill PLC, by Marshal W. Grate and Kara T. Rozin, for Respondent

Kalniz, Iorio & Reardon, Co, LPA, by Fillipe S. Iorio, for Charging Party

DECISION AND ORDER

On April 12, 2022, Administrative Law Judge David Peltz issued his Decision and Recommended Order[1] in the above 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 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

William F. Young, Commission Member

Issued: June 2, 2022

[1] MOAHR Hearing Docket No. 21-002529

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

In the Matter of:

HOPKINS PUBLIC SCHOOLS,
Respondent-Public Employer,

Case No. 21-A-0196-CE
-and- Docket No. 21-002529-MERC

HOPKINS EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Clark Hill PLC, by Marshal W. Grate and Kara T. Rozin, for Respondent

Kalniz, Iorio & Reardon, Co, LPA, by Fillipe S. Iorio, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Hopkins Education Association (HEA), MEA/NEA against Hopkins Public Schools. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed on or before August 26, 2021, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

Hopkins Public Schools is a general powers school district under the Michigan Revised School Code, MCL 380.1 *et seq*., with approximately 1,500 to 1,600 students. Charging Party is the exclusive representative of a bargaining unit consisting of all certified probationary and tenured elementary and secondary teachers employed by Hopkins Public Schools, including special education teachers, part-time teachers and teaching coordinators. The bargaining unit also includes librarians, athletic director, licensed counselors, social workers, school psychologists, occupational therapists and speech pathologists. There are approximately 93 employees in the HEA unit. As set forth in more detail below, the HEA and the school district are parties to a collective bargaining agreement which contains a salary grid pursuant to which unit members advance based upon their years of service and educational degrees.

On January 25, 2021, the Union filed an unfair labor practice charge asserting that the school district violated Sections 10(1)(a) and (e) of PERA by unilaterally implementing Board Policy 3221, pursuant to which a teacher will not be eligible to advance on the salary grid if he or she is rated ineffective on the annual year-end performance evaluation or receives a minimally effective rating for two consecutive years. The charge further asserts that the Employer engaged in direct dealing with members of the bargaining unit by communicating with employees about its intention to implement the policy.[1]

On March 11, 2021, Respondent filed a motion for summary disposition arguing that it had the sole authority to implement and maintain a policy relating to performance-based compensation because such a policy constitutes a prohibited subject of bargaining under Section 15(3)(o) of PERA. Alternatively, the school district asserts that even if it had a duty to bargain over the substance of Board Policy 3221, it fulfilled that obligation by engaging in good faith negotiations with the Union. Lastly, Respondent contends that the HEA should be equitably estopped from bringing this charge because it took the position during bargaining that a performance-based compensation plan for teachers was a prohibited subject under the Act.

Charging Party filed a response to the motion for summary disposition on April 6, 2021. I held oral argument on the school district's motion on April 28, 2021. After considering the arguments of the parties, I concluded that questions of fact existed which required an evidentiary hearing. The hearing was held by *Zoom* video conference on July 8, 2021. The parties filed post-hearing briefs on August 26, 2021.

Facts:

For many years, collective bargaining agreements between the HEA and the Employer have included a salary schedule pursuant to which a unit member could receive an adjustment in compensation in the form of a vertical "step" increase based upon his or her years of service with the school district and/or a horizontal "lane" change to reflect various educational achievements. During negotiations which ultimately resulted in the 2018-2020 contract, Respondent introduced a proposal which would have prohibited any teacher from receiving a "negotiated increase in compensation" unless that individual was rated effective or highly effective on the final year end evaluation preceding the effective date of the compensation increase. The Union rejected the school district's proposal on the basis that it related to a prohibited subject of bargaining.

Negotiations for the 2020-2021 collective bargaining agreement took place over the course of two sessions held on May 27, 2020, and June 3, 2020. Union President Jacob Oaster was the lead negotiator for the HEA while Respondent's bargaining team was headed by Superintendent Gary Wood. During the negotiations, the school district proposed adding "performance pay" language to Article XVIII of the contract which it claimed was necessary to comply with Section 1250 of the Revised School Code, MCL 380.1250, and to avoid a forfeiture of funds due the school district under Section 164h of the State School Aid Act, MCL 388.1764h. Under the performance pay language proposed by Respondent, any teacher rated ineffective and/or minimally effective

[1] Charging Party did not address the direct dealing claim in its post-hearing brief. Accordingly, I consider that issue to have been waived.

on the two most recent year-end performance evaluations would be prohibited from advancing on the salary schedule or receiving an increase in compensation.

The HEA rejected the school district's performance pay proposal. According to Wood, the Union disagreed with the performance pay language and asserted that the proposal could not be included in the contract because it related to a prohibited subject of bargaining. In an attempt to address the school district's concerns regarding a potential loss of school aid funds, the Union countered by proposing to add language to Article XVIII of the contract authorizing the Board to implement policies to comply with Section 164h of the State School Aid Act, provided that the Union is given notice of the adoption of such policies and that the policies do not "in any way, alter the provisions contained in" the collective bargaining agreement. Oaster gave this proposal to Wood during a sidebar and indicated that the same language had been used during negotiations with a different school district.

Ultimately, the parties reached a tentative agreement on a successor contract at the conclusion of the June 3, 2020, bargaining session. Although Oaster repeatedly told Wood on that date that the HEA reserved the right to file a grievance or bring an unfair labor practice charge if it believed that any policy adopted by the Board conflicted with the contract, the Union agreed to strike language from its proposal relating to conflicts with the agreement. Instead, the parties agreed to the following provision with respect to steps, lanes and performance pay:

ARTICLE XVIII
SALARY SCHEDULE

> Effective upon ratification by both parties, and pro-rated if not ratified by the start of the 2020-2021 school year, lanes will be awarded in 2020-2021.
>
> Both parties agree that employees shall remain at their 2019-2020 wage and compensation levels and there shall be no increase or reduction in salary schedule or step advancement. The parties agree to a contract wage reopener in October 2020 to negotiate any changes in compensation and/or step advancement. There shall be no increases or decreases unless the parties mutually agree in writing to such and any tentative agreement between the parties is ratified by both parties by December 31, 2020.
>
> In order to comply with MCL 388.1764h, the Board will adopt policies to comply with this provision and communicate the details of these policies to all eligible employees before they take effect.

Article VI of the tentative agreement is entitled "Board Policies." That provision authorizes Respondent to promulgate new policies or amend existing policies from time to time as needed, provided that such policies do not conflict with the provisions of the contract, with the proviso that "[t]hese provisions do not supersede the prohibited subjects within Act 367 as amended."

The tentative agreement was ratified by the parties on or around June 15, 2020. Five days later, at its regular meeting on July 20, 2020, the Board adopted Policy 3221 which provides that

any teacher who is rated ineffective on their annual year-end evaluation or rated minimally effective for two consecutive years will not be eligible for a "compensation increase" the following contract year. Despite language in the contract requiring the Board to communicate details of any performance pay policies to eligible employees before they take effect, it is undisputed that Respondent did not provide notification to employees or to the HEA regarding the Board's adoption or implementation of Policy 3221 until several months later, as set forth in more detail below. At hearing, Wood testified, "Yeah, my bad. You know, I will say it was the most difficult year and busiest year I've ever had dealing with COVID and events like that. So it was just kind of on the back burner."

Bargaining began for the wage reopener on October 28, 2020. On that date, the parties exchanged numerous proposals relating to step advancements. A tentative agreement was reached at the conclusion of the second bargaining session on November 5, 2020. Pursuant to the terms of that agreement, the salary schedule would increase by 1.5 percent retroactively from the beginning of the school year and unit members were to advance one step, effective upon ratification of the agreement by both parties. The agreement provided that lanes would continue to be awarded in their entirety for the 2020-2021 school year. Finally, the parties agreed that all bargaining unit members would receive a signing bonus in the form of a one-time off-schedule payment in the amount of $200 and teachers newly employed with the district for the 2020-2021 school year would receive a one-time $500 off-schedule payment. The school district did not inform the Union that the Board had adopted Policy 3221, nor was there any discussion during negotiations on the wage reopener that a teacher might be ineligible to receive an increase in compensation based upon his or her performance evaluation.

It was not until November 19, 2020, after the Board ratified the wage reopener that Respondent provided notice to the Union of the existence of Board Policy 3221. On that date, Superintendent Wood sent an email to Oaster with a copy of the policy attached. Four days later, Wood sent a copy of the policy to all of the school district's teachers. When asked at the hearing in this matter what prompted him to finally alert the Union to the existence of Policy 3221, Wood testified, "I would assume that when I was putting the [wage reopener] agreement together that language stood out to me and I knew that, oops, I didn't do that."

On December 4, 2020, Oaster sent an email to Wood in which he asserted that the performance pay policy conflicted with the terms of the collective bargaining agreement and threatened to file an unfair labor practice charge or a grievance. That same day, MEA UniServ Director Christine Anderson sent an email to Wood objecting to Respondent's implementation of the policy and demanding that the Employer withdraw the policy from consideration. Wood responded to Anderson on December 11, 2020, asserting that the issue had been "problem-solved" at the bargaining table and that the HEA was aware that the Board would be implementing a performance-based compensation policy like the one adopted by the Allegan Area Educational Service Agency (AAESA), an intermediate school district, several months earlier.[2]

[2] Wood testified that he told the Union during negotiations on the 2020-2021 contract that the school district intended to adopt the same policy implemented by the AAESA. However, it is undisputed that Wood never provided a copy of that policy to the HEA bargaining team for review.

The Union filed the instant charge on January 25, 2021. As of the date of the hearing in this matter, no teacher employed by Hopkins Public Schools has been rated ineffective on his or her annual year-end evaluation, nor have any of Respondent's teachers received a minimally effective rating on two consecutive evaluations.[3]

Discussion and Conclusions of Law:

The HEA contends that Respondent violated its obligation to bargain in good faith under Section 15 of PERA by unilaterally implementing Board Policy 3221 pursuant to which any teacher who is rated ineffective on their annual year-end evaluation or rated minimally effective for two consecutive years will not be eligible for the step increases negotiated by the parties during bargaining on the 2020 wage reopener. According to the Union, the adoption of the policy by the school district constituted an unlawful unilateral change in existing terms and conditions of employment and a repudiation of the collective bargaining agreement.

Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory bargaining obligation or has been freed from it. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron* at 318; *St Clair Co ISD*, 2005 MERC Lab Op 55, 61-62. As the Michigan Supreme Court stated in *Port Huron* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*. See also *Wayne Co Community Coll*, 20 MPER 59 (2007).

It is well established that a salary grid which establishes wage rates for employees in accordance with the number of years of service is a mandatory subject of bargaining. See *Jackson Cmty Coll*, 187 Mich App 708 (1992); *Detroit Pub Sch*, 1984 MERC Lab Op 579. In the instant case, the collective bargaining agreement negotiated by the parties in November 2020 by way of a wage reopener contains a negotiated salary schedule that includes both horizontal and vertical steps tying compensation to a teacher's years of service and academic achievements. Article XVIII of that agreement states, "Effective upon ratification by both parties, and pro-rated if not ratified by the start of the 2020-2021 school year, employees shall advance one step [on the salary schedule]. Lanes will be awarded in their entirety for [the] 2020-2021 school year" There is no dispute that Respondent implemented a policy which links advancement on the salary schedule to

[3] It is well established that the statute of limitations on a claim alleging a unilateral change in terms and conditions of employment begins to run on the date the employer announces the change, as the unlawful conduct is completed at that time. *City of Detroit (DPOA)*, 21 MPER 70 (2008); *Lapeer Co*, 19 MPER 45 (2006). *Tuscola ISD*, 1985 MERC Lab Op 123. Accordingly, the fact that no employee has been identified as having suffered individualized harm as of the date of hearing does not render this dispute moot.

evaluation ratings contrary to that contractual obligation. Respondent contends, however, that it was authorized to implement Board Policy 3221 because it is a prohibited subject of bargaining under Section 15(3)(o) of PERA.

With the passage of Public Act 112 (PA 112) of 1995, the Legislature significantly narrowed the scope of issues over which a public school employer is required to bargain with the labor organizations representing its employees. PA 112 made certain decisions by a public school employer "prohibited subjects of bargaining" which are within the sole authority of the public school employer to decide, including the school year starting day, the policyholder of employee group insurance benefits, the use of volunteers and pilot programs, and the decision whether or not to contract with a third party for one or more noninstructional support services. Although 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).

The Legislature added to the list of prohibited subjects of bargaining in 2009 and again in 2011 with the passage of Public Act 103 (PA 103). Effective July 19, 2011, PA 103 prohibits public school employers and representatives of their employees from bargaining over a wide range of topics, including decisions regarding which teachers should be laid off or retained in the event of a reduction in force, decisions regarding the discharge or discipline of an employee whose employment is regulated by the teacher tenure act (TTA), MCL 38.71 et seq., the recall of teachers following a reduction in force, and a public school employer's performance evaluation system, classroom evaluations and parental notification of ineffective teachers.

Since the enactment of PA 112 and PA 103, the Commission and the Courts have interpreted the provisions of Section 15(3) broadly, concluding that the plain language of the statute gives public school employers extensive discretion to make decisions relating to matters including teacher discipline, teacher placement and the subcontracting of noninstructional support services. For example, in *Shiawassee ISD*, 2017 MPER 13 (2017), the Commission held that the union violated Section 10(2)(d) of PERA by grieving a two-day suspension issued to a teacher because the school district's action implicated discipline, a prohibited subject of bargaining under Section 15(3)(m). The Union had claimed that the grievance was lawful because it alleged that the school district violated statutory and contractual rights unrelated to discipline. In rejecting that argument, the Commission held that the language of Section 15(3)(m) is not limited to decisions concerning whether an employee should be disciplined or discharged, but also covers substantive and 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 or discharge. In *Ionia Public Sch v Ionia Ed Ass'n*, 311 Mich App 479 (2015), the Court of Appeals affirmed the Commission's conclusion that a procedure governing the assignment of vacant teaching positions was part of the decision-making process with respect to teacher placement and that, based upon the plain language of Section 15(3)(j) of the Act, the employer had no duty to bargain with the union over the discontinuation of that procedure.

This is a case of first impression involving the application of Section 15(3)(o) of PERA, MCL 423.215(3)(o), which the Legislature added to the Act in 2011. Section 15(3)(o) provides that a collective bargaining agreement between a public school employer and a bargaining representative of its employees shall not include:

> Decisions about the development, content, standards, procedures, adoption and implementation of the method of compensation required under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions about how an employee performance evaluation is used to determine performance-based compensation under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

Respondent relies on Section 15(3)(o) to argue that its unilateral implementation of Board Policy 3221 was lawful. There can be no dispute that a public school employer has extensive authority under the Act to develop and implement a performance-based method of compensation, including the content, standards and procedures of such a plan. That is not, however, the question which is implicated by the instant charge. The issue to be decided in this matter is whether the salary schedule agreed to by both the Union and the school district in November of 2020 is unenforceable pursuant to Section 15(3)(o). To accept the premise that Respondent is not bound by the negotiated salary schedule would essentially render a public school employer's obligation to negotiate over the wages of its employees a nullity. A school district could, for example, negotiate a specific base wage rate for its instructional staff and then unilaterally lower the salary of individual teachers to minimum wage based on those teachers' performance evaluation results. Initially, counsel for Respondent appeared to argue against such a broad reading of the statute. At oral argument, counsel stated, "[W]e recognize our duty to bargain over salary schedule, starting rates for new hires, when to place people on the salary schedule, advance, all of that is a subject of bargaining." Since that time, however, Respondent has apparently abandoned any pretense of adherence to the notion that a public school employer has a continuing duty to bargain over wages. In its brief, the school district explicitly asserts that by enacting Section 15(3)(o), the Legislature eliminated "the right to bargain salary schedules, salary grids, pay and wages for all teachers regardless of their evaluation score." Such an argument is simply not supported by the language of Section 15(3)(o) or related provisions of the Revised School Code and the State School Aid Act.

Wages go to the core of the employer-employee relationship. *Retlaw Broadcasting Co*, 324 NLRB 138, 141 (1997), enf'd 172 F2d 3d 660 (CA 9, 1999); *Curtiss-Wright Corp*, 347 F2d 61, 69 (CA 3, 1965). In fact, a public employer's duty to negotiate over wages is one of only two topics of bargaining specifically referenced in Section 15(1) of PERA, which recognizes the "mutual obligation of the employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to wages, hours and conditions of employment." Despite the fundamental nature of the obligation to bargain wages, that term does not appear anywhere in Section 15(3)(o) of PERA, nor does the statute specifically authorize a public school employer to withhold negotiated or scheduled wage increases. Rather, Section 15(3)(o) refers to

the implementation of a method of performance-based compensation.[4] It would not be inconsistent with the language of Section 15(3) for a school district to utilize both a negotiated salary schedule and a performance-based evaluation system simultaneously. Indeed, such a result appears to have been specifically contemplated by the Legislature. Section 1250 of the Revised School Code, MCL 380.1250, which is referenced in Section 15(3)(o) of PERA, requires a public school district to "maintain a method of compensation for its teachers and school administrators that includes job performance and job accomplishments as a *significant factor* in determining compensation and additional compensation." (Emphasis supplied). Such language indicates that a school district may consider criteria other than evaluation scores in determining compensation, presumably including negotiated salary schedules based upon factors such as length of service or educational achievements.

Further clarification regarding the Legislature's intent with respect to the continuing viability of salary schedules for public school employees is provided by (4) of Section 1250. That subsection explicitly prohibits a community district from using "length of service or achievement of an advanced degree as a factor in compensation levels or adjustments in compensation."[5] There is no such limitation in the Revised School Code for a general powers school district, a public school academy or an intermediate school district. Michigan law recognizes the maxim, "expressio unius est exclusio alterius," which means that the expression of one thing is the exclusion of another. *Standish-Sterling Educational Support Personnel Ass'n*, 29 MPER 52 (2016); *Alcona County v Wolverine Environmental Products, Inc*, 233 Mich App 238, 247 (1998). The fact that the Legislature prohibited only community school districts from utilizing length of service or educational achievements indicates that a salary schedule which relies upon such criteria remains a lawful subject of bargaining for a general powers school district such as Respondent.

If there was any doubt that a public school employer remains obligated to bargain over wages and salary schedules, the Legislature dispelled such a notion when it amended Section 164h of the State School Aid Act, MCL 388.1764h in 2018. Although Section 164h is not specifically referenced in Section 15(3)(o) of PERA, there can be no question that these provisions have a common purpose and, therefore, should be construed together and, if possible, harmonized based upon the doctrine of *in pari materia*. *Decatur Pub Sch*, 27 MPER 41 (2014); *Rochester Cmty Sch Bd of Ed v State Bd of Ed*, 104 Mich App 569, 578-579 (1981). Section 164h serves as the enforcement mechanism for Section 1250's mandate that a school district maintain a performance-based method of compensation. Section 164h(1)(d) provides that a district or intermediate school

[4] The Legislature clearly knew how to reference wages, as it did when it enacted 2011 PA 54 which amended PERA at MCL 423.215b to create an exception to a public employer's obligation to pay salary increases. PA 54 provides, in part, that "after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement." Based on that language, the Commission has held that a public employer is excused from the obligation to pay negotiated wage increases, whether due to increased experience or educational achievement, upon contract expiration. *Waverly Cmty Sch*, 26 MPER 34 (2012); *Bedford Pub Sch*, 26 MPER 35 (2012), aff'd 305 Mich App 558 (2014).

[5] A community school district is a political subdivision and public body separate and distinct from the state and other districts within the state which is governed by Part 5B of the Revised School Code.

district that enters into a collective bargaining agreement which includes a method of compensation that does not comply with section 1250 of the Revised School Code "shall forfeit an amount equal to 5% of the funds due to the district or intermediate district under this article." Indeed, Respondent relied on Section 164h in support of its various bargaining proposals during contract negotiations in 2020.

In 2018, the Legislature amended Section (1)(d) by adding, "This subdivision shall not be construed to affect the operation of section 15(3)(o) of 1947 PA 336, MCL 423.215, the operation of section 1231 of the revised school code, MCL 380.1231, *or the requirement to confer in good faith with respect to wages under section 15(1) of 1947 PA 336, MCL 423.215*. (Emphasis supplied). With the addition of this language, it is clear that the Legislature specifically preserved the obligation of a public school employer to bargain wages. Accordingly, the salary schedule negotiated by the parties in November of 2020 is necessarily a valid and enforceable contract provision which Respondent violated by unilaterally implementing a policy pursuant to which bargaining unit members may be paid at amounts less than the negotiated rates. To conclude otherwise would essentially render a public school employer's obligation to negotiate the wages of its employees under Section 15(1) of PERA a nullity.

In so holding, I find no merit to the school district's contention that Charging Party waived any objections to Board Policy 3221 on June 3, 2021, when it agreed to strike language from its proposal relating to conflicts with the agreement and entered into a tentative collective bargaining agreement giving Respondent the right to adopt a performance-based method of compensation. The record indicates that at the June 3rd bargaining session, Oaster repeatedly indicated to Wood that the HEA reserved the right to file a grievance or bring an unfair labor practice charge if it believed that a policy adopted by the Board conflicted with the contract. Moreover, the language agreed to by the parties authorized the school district to adopt policies to comply with Section 164 of the State School Aid Act which, as noted, specifically states that wages remain subject to the duty to bargain pursuant to Section 15(1) of PERA.

I also reject Respondent's argument that the Union should be equitably estopped from bringing the instant charge because it refused to bargain with the school district regarding the implementation of a performance-based compensation policy. Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts. *Van v Zahorik*, 469 Mich 320, 335 (1999). In the instant case, Respondent has failed to establish the elements of equitable estoppel. The record establishes that the Union consistently objected to any attempts by Respondent to link advancement on the salary schedule to performance evaluation results and, as noted, repeatedly warned the school district that it would challenge any policy which conflicted with the terms of the collective bargaining agreement. Thus, there can be no legitimate claim that the Union somehow induced Respondent into believing that it would not bring this matter before the Commission.

More importantly, the school district cannot show that it relied to its detriment on any misrepresentations by the HEA bargaining team. If Respondent had a legitimate belief that Section 15(3)(o) gave it the authority to unilaterally adopt and implement Board Policy 3221, then

whatever position Charging Party took at the bargaining table is essentially irrelevant. Although a public school employer and union may discuss a prohibited subject of bargaining, to the extent that a collective bargaining agreement is reached which encompasses a prohibited subject, that portion of the contract is unenforceable. *Mich AFL-CIO v MERC*, 212 Mich App 472, 484-488 (1995). The public school employer may put an end to discussions about a prohibited subject by either taking unilateral action on the matter or by demanding the immediate cessation of those discussions. See *Kalamazoo County*, 32 MPER 94 (2009). Ultimately, whether a topic is in fact a prohibited subject of bargaining is an issue within the exclusive jurisdiction of the Commission to determine. *Saginaw Pub Sch*, 1982 MERC Lab Op 188; *St Clair Cnty*, 1983 MERC Lab Op 624. Accordingly, there can be no valid claim by Respondent that it was harmed as a result of the position taken at the bargaining table by the HEA.

If either party has an equitable-based claim as a result of the events giving rise to this charge, it is the Union, not the school district, which can legitimately assert that relied to its detriment on a misrepresentation and obfuscation. The record establishes that on or about June 15, 2020, the Board ratified a collective bargaining agreement which contained a clause requiring the school district to provide notice to employees prior to the effective date of any policy adopted by the Employer for the purpose of complying with Section 164h of the State School Aid Act. Just five days later, the Board adopted Policy 3221.[6] There is no dispute that the school district failed to communicate with employees or the Union about that policy prior to its adoption, even though Superintendent Wood and other members of the school district's bargaining team were clearly aware that the possibility of the Board linking a teacher's advancement on the salary schedule to performance evaluations was a matter of great concern to the HEA. The Union was left in the dark about the Board's adoption of Policy 3221 for several months. Shockingly, the school district remained silent about the existence of the policy even as the parties entered into negotiations on a wage reopener that fall. Although those bargaining sessions included the exchange of multiple proposals relating to step increases for members of the HEA unit and ultimately led to agreement on a salary schedule which provided for step advancement for unit members, there was still no mention of the policy during negotiations. It was not until after that agreement was ratified that Wood finally provided notice to the HEA of the existence of Board Policy 3221. At the hearing, Wood attempted to justify his conduct by citing the Covid-19 pandemic and he described his failure to communicate by declaring "[m]y bad" and "oops." I find such testimony entirely unconvincing and indicative of an attempt by the school district to intentionally mislead the Union during bargaining.

The harm to the Union resulting from the Employer's conduct in this matter is readily apparent. Even assuming arguendo that the Board had the right to unilaterally implement Policy 3221 based upon Section 15(3)(o) of PERA, the school district's prior exercise of that authority is

[6] It should be noted that the policy which the Board implemented was significantly worse than what the school district proposed at the bargaining table. During negotiations on the 2020-2021 contract, the Board proposed that only teachers who were rated ineffective or minimally effective on the two most recent year-end performance evaluations would be prohibited from receiving a step increase. Under Board Policy 3221, a teacher who is rated ineffective the most recent year-end evaluation is deprived of the opportunity for advancement on the salary schedule. Such regressive unilateral action has itself been found to constitute an unfair labor practice in cases involving changes made after an employer's declaration of impasse. *NLRB v Cromptom-Highland Mills*, 337 US 217, 225 (1949).

a fact which would undoubtedly have been of significance to the Union's bargaining team during negotiations on the wage reopener. Collective bargaining agreements are in large part the products of compromises. *Hurley Medical Center*, 32 MPER 33 (2019); *Executive Cleaning Services*, 315 NLRB 227, 228 (1994), enf denied on other grounds 67 F3d 446 (CA 2 1995). Although we cannot require parties to agree or to make concessions, each party must ordinarily give up something to gain something else to reach an agreement and the compromises that result in agreement provide stability to the parties' relationship and a degree of reliability as to future interactions. *Hurley*; *Kalamazoo Co & Kalamazoo Co Sheriff*, 22 MPER 94 (2009). As noted, step increases were the primary subject of discussion during negotiations on the wage reopener. However, the Union engaged in those discussions without any understanding that the school district had already implemented a policy pursuant to which some members would be prohibited from reaping the benefits which the parties were in the process of bargaining. Armed with such knowledge, the Union may have sought concessions on matters unrelated to performance-based compensation or refused to agree to Employer proposals on other issues. Respondent's conduct in hiding the existence of Board Policy 3221 is likely to have a corrosive effect on the parties' bargaining relationship and impair future negotiations, if not remedied. Based on the totality of the circumstances, I conclude that the school district not only repudiated the terms of the contract when it implemented the policy, it also actively engaged in bad faith bargaining by virtue of its conduct during negotiations in the fall of 2020.

In so holding, I note that the Commission has previously determined that a decision by a public employer may be subject to review even where that employer had the legitimate authority to take such action. For example, the Commission has held that although a school district has the right to subcontract noninstructional support services under Section 15(3)(f) of the Act, the exercise of that authority is unlawful if such action is motivated by anti-union animus. *Coldwater Cmty Sch*, 2000 MERC Lab Op 244; *Parchment Sch Dist*, 2000 MERC Lab Op 110. That same rationale applies in equal force here. Thus, even if I were to accept Respondent's contention that it had the unfettered discretion under Section 15(3)(m) to unilaterally modify the wages of its teachers, I would nonetheless conclude under these circumstances that the school district violated PERA by utilizing that authority in a manner which otherwise abrogated its statutory obligation to negotiate in good faith.

I have carefully considered the remaining arguments set forth by the parties in this matter, including Charging Party's contention that the Employer violated Section 10(1)(a) of PERA by interfering with, restraining, or coercing employees in the exercise of rights protected under PERA, and find that they do not warrant a change in the result. For the reasons set forth above, I conclude that Respondent violated Section 10(1)(e) of the Act by unilaterally implementing Board Policy 3221 and by failing to negotiate in good faith on a wage reopener. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Hopkins Public Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Enforcing Board Policy 3221 to the extent that it alters negotiated salary schedules.

    b. Refusing to bargain in good faith with the Hopkins Education Association, MEA/NEA concerning wages, hours and working conditions.

2. Take the following affirmative action to effectuate the purposes of the act.

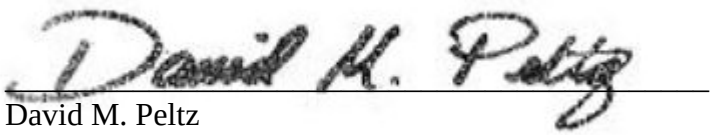
    a. Restore the status quo in effect prior to the above unlawful unilateral action by reinstating the terms and conditions of the salary schedule negotiated between Hopkins Public Schools and Hopkins Education Association, MEA/NEA until an agreement is reached with the Union to modify that agreement.

    b. Make members of the bargaining unit represented by the Hopkins Education Association whole for monetary losses incurred as a result of Respondent's unilateral modification/repudiation of the collective bargaining agreement, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

    c. Upon request, bargain in good faith with the Hopkins Education Association, MEA/NEA over wages, including salary schedules which utilize length of service or achievement of an advanced degree as a factor in compensation levels or adjustments in compensation.

    d. Post the attached notice on Respondent’s premises in places where notices to employees are customarily posted for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: April 12, 2022

NOTICE TO ALL EMPLOYEES

HOPKINS PUBLIC SCHOOLS, a public employer 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 order of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, we hereby notify our employees that:

WE WILL cease and desist from:

1. Enforcing Board Policy 3221 to the extent that it alters negotiated salary schedules.

2. Refusing to bargain in good faith with the Hopkins Education Association, MEA/NEA concerning wages, hours and working conditions.

WE WILL take the following affirmative action to effectuate the purposes of the Act:

1. Restore the status quo in effect prior to the above unlawful unilateral action by reinstating the terms and conditions of the salary schedule negotiated between Hopkins Public Schools and Hopkins Education Association, MEA/NEA until an agreement is reached with the Union to modify that agreement.

2. Make members of the bargaining unit represented by the Hopkins Education Association whole for monetary losses, if any, incurred as a result of Respondent's unilateral modification/repudiation of the collective bargaining agreement, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

3. Upon request, bargain in good faith with the Hopkins Education Association, MEA/NEA over wages, including salary schedules which utilize length of service or achievement of an advanced degree as a factor in compensation levels or adjustments in compensation

WE ACKNOWLEDGE THAT all of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of PERA.

HOPKINS PUBLIC SCHOOLS

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 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, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.