STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

THE PROFESSIONAL PERSONNEL OF
VAN DYKE,
Labor Organization-Respondent,

MERC Case No. 20-C-0554-CU

-and-

VAN DYKE PUBLIC SCHOOLS,
Public Employer-Charging Party.
____/

Appearances:

Cousens Law, by Mark H. Cousens, for Respondent

Lusk & Albertson, PLC, by Robert T. Schindler and Adam J. Walker, for Charging Party

DECISION AND ORDER

Due to declines in student enrollment, the Van Dyke Public Schools (Employer) assigned certain teachers represented by The Professional Personnel of Van Dyke (Union) to lunchroom supervision duties because the Employer could not schedule these teachers with sufficient classes to fill a 1.0 full time equivalency ("FTE"). The Union subsequently submitted a grievance alleging that these teachers were assigned lunchroom supervision duties without receiving the compensation due them under Article II of the collective bargaining agreement. The Employer denied the grievance, asserting that further pursuit of the grievance would be an unfair labor practice. The Union proceeded to submit a demand for arbitration, as a result of which the Employer filed an unfair labor practice charge.

ALJ Calderwood issued his Decision and Recommended Order[1] on April 13, 2021. He found that the sole issue before him was whether the Union violated Section 10(2)(d) of PERA by pursuing to arbitration a grievance challenging the school district's unilateral decision to assign certain elementary teachers to a lunch supervisory period as part of their normal daily schedule. In addressing this issue, the ALJ found that lunch-room supervision was not the sort of assignment that would place it under the definition of "teacher placement" as contemplated by Section 15(3)(j) and concluded that the Union did not breach its duty under Section 10(2)(d) of PERA by pursuing and seeking to arbitrate the grievance.

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[1] MOAHR Hearing Docket No. 20-006088

In its exceptions, the Employer argues that the ALJ erred when he found that the Union did not breach its duty under Section 10(2)(d) of PERA by pursuing and seeking to arbitrate a grievance challenging the Employer's decision to assign certain elementary teachers to lunch duty as part of their normal daily schedule. More specifically, the Employer notes that the ALJ improperly relied upon the Commission's decision in *Garden City*, 34 MPER 19 (2020); that the grievance involved in this dispute pertains to teacher placement; and that the Union's demand to arbitrate violated its duty to bargain.

In its reply to the Employer's exceptions, the Union argues that "the Administrative Law Judge reached the correct conclusion even if his reasoning was not correct." According to the Union, the exceptions are without merit because the grievance relates strictly to compensation due for working cafeteria duty and does not challenge the assignment of staff to these positions. The Union further argues that the Employer has attempted to conflate a compensation grievance with an abandoned dispute relating to the assignment of staff. Although the Union admits it initially sought to bargain over a decision to place professionals in a non-professional position by requiring them to work in the cafeteria, it points out that it neither submitted that dispute to arbitration nor attempted to compel the Employer to bargain further over the issue.

For the reasons set forth below, we affirm the ALJ's determination that the Union did not violate Section 10(2)(d) of PERA by pursuing and seeking to arbitrate a grievance implicating a prohibited subject of bargaining. Contrary to the ALJ, however, we find, after reviewing the stipulated record, that there is no basis for the ALJ's conclusion that the grievance was filed over the assignment of teachers as opposed to the compensation due to them under the terms of the parties' collective bargaining agreement. Accordingly, we affirm the ALJ's Decision and Recommended Order only to the extent set forth herein.

Procedural History:

On March 10, 2020, the Employer filed the instant charge alleging that the "assignment/placement of teachers to a lunch supervisory period to reach a full schedule is a prohibited subject of bargaining under" Section 15(3)(j) of PERA. The Employer further alleged that the Union's demand for arbitration relating to the Employer's teacher placement decision violates the Union's duty to bargain in good faith and constitutes a violation of Section 10(2)(d) of the Act.

After several prehearing conferences, it was agreed that the dispute could be decided through factual stipulations and briefing by the parties. On September 3, 2020, the parties submitted their stipulations of fact as well as an agreed upon briefing schedule. Initial briefs were received on September 29, 2020, and September 30, 2020. Reply briefs were received on October 14, 2020, and, on April 13, 2021, 2021, the ALJ issued a Decision and Recommended Order.

On May 3, 2021, the Employer filed exceptions to the ALJ's Decision and Recommended Order and on June 8, 2021, the Union filed a "Brief in Reply to Employer's Exceptions to the Administrative Law Judge's Decision and Recommended Order" (Brief in Reply).

On June 18, 2021, the Employer filed a response to the Union's Brief in Reply in which it characterizes the Brief in Reply as cross-exceptions under Rule 176(8), in light of the Union's argument that the ALJ erred in finding that the issue involved in this case was a challenge to the Employer's decision to assign teachers to lunch duty. The Employer maintains that the ALJ was correct in interpreting the union's grievance as one of placement and assignment, even if the ALJ ultimately reached the wrong result.

On June 22, 2021, the Union filed a Motion to Strike the Employer's response to its June 8, 2021, Brief in Reply. In its Motion, the Union argues that the response submitted by the Employer was not permitted by the Commission's rules and represented an attempt to file a reply to the Union's response to exceptions. The Union further argues that its June 8, 2021, Brief in Reply was a "legal memorandum in support of the decision and recommended order" and not "cross exceptions" under the Commission's rules.

On July 1, 2021, the Employer filed a response to the Union's Motion to Strike in which it argues that the Union's Motion to Strike misconstrues the basis for the Employer's Response to Respondent's Cross-Exceptions (the Union's June 8, 2021 Brief in Reply). According to the Employer, the Union's brief constituted cross-exceptions because the brief did not support the ALJ's decision, except for the ultimate position that Union did not commit an unfair labor practice. Consequently, the Employer requests that the Commission deny the Union's Motion to Strike or, in the alternative, strike both the Union's brief allegedly supporting the decision and the Employer's response brief.

Facts:

The parties submitted the following Joint Stipulation of Facts:

1. Charging Party Van Dyke Public Schools (VDPS) is a public school employer as defined by the Public Employment Relations Act (PERA).

2. Respondent Professional Personnel of Van Dyke (PPVD) is the sole and exclusive bargaining representative of teachers and other certified professionals employed by VDPS (as defined within the relevant collective bargaining agreement between the parties).

3. The PPVD bargaining unit includes elementary enrichment teachers – i.e., teachers that are certified and assigned to teach non-core subjects such as art, music, physical education, and technology.

4. Due to declines in enrollment, VDPS was not able to schedule elementary enrichment teachers with enough classes to fill a 1.0 full time equivalency (FTE) schedule.

5. As a result, Elementary enrichment teachers were assigned to lunchroom supervision duties to fill out the remainder of their schedule.

6. None of the elementary enrichment teachers had their schedules reduced from a 1.0 FTE.

7. On October 14, 2019, the PPVD President, Val Dutton, sent to VDPS Personnel Director Edie Valentine and Superintendent Piper Bognar a demand to bargain relative to the assignment of lunch supervisory duties.

8. On October 21, 2019, VDPS administrators and PPVD representatives met in an effort to resolve the matter.

9. Following the meeting, on October 22, 2019, Ms. Valentine sent an email to Ms. Dutton as a follow-up to the PPVD demand to bargain. In that email, Ms. Valentine explained: "we will review the elementary enrichment schedule issue further in an attempt to find a resolution without having to engage in bargaining."

10. On October 29, 2019, Ms. Valentine emailed Ms. Dutton with a proposed modification of the enrichment schedules, which removed lunch supervision and replaced it with building support – which included possible lunch supervision, among other activities.

11. On October 30, 2019, Ms. Dutton responded, indicating that the assignment of lunch supervision as a possibility remained unacceptable.

12. On November 6, 2019, Ms. Valentine sent an email to Ms. Dutton indicating that, since the possibility of lunch supervision was unacceptable to the PPVD, the School District would reduce the enrichment teachers' schedules by removing the unassigned minutes. As a result, the elementary teachers would be subject to a partial layoff and reduction in compensation. That reduction varied by teacher and was specifically listed for each teacher in the email.

13. On November 8, 2019, the PPVD filed a grievance relative to the notified reduction of the elementary enrichment teachers' schedules.

14. On November 14, 2019, VDPS and PPVD representatives met to discuss the grievance. At this meeting, the parties agreed there would be no reduction to the elementary enrichment teachers' schedules pending continued discussions

relative to the duties assigned during the unassigned portion of the elementary enrichment teachers' workday.

15. On November 18, 2019, Ms. Valentine emailed Ms. Dutton and proposed that the number of days an elementary enrichment teacher would be given lunch supervision during their unassigned time would be dependent on the number of unassigned blocks per week the teacher had.

16. On November 20, 2019, Ms. Dutton responded to Ms. Valentine by email and requested to meet after Thanksgiving.

17. On December 8, 2019, Ms. Dutton emailed Ms. Valentine and proposed that, instead of lunch supervision, elementary enrichment schedules be adjusted to allow for a transition time and that the remainder of unassigned time be devoted to building support that did not include lunch supervision.

18. When the School District would not agree to Ms. Dutton's proposal, Ms. Dutton indicated the PPVD would be filing for mediation to resolve the dispute.

19. On January 10, 2020, Ms. Valentine responded to Ms. Dutton by email, indicating that teacher placement and assignments are prohibited subjects of bargaining. Ms. Valentine further communicated that it would not move forward with mediation and, if the PPVD continued to persist, would file an Unfair Labor Practice (ULP) against the PPVD.

20. On January 22, 2020, the PPVD then filed Grievance 2020-01. Grievance 2020-01 asserted that the School District violated: "Article II – Salary Schedule – Extra Duty." The grievance went on to assert that the violation was subsection 5 thereof stating: "Teachers working cafeteria duty will be paid $22.00 for periods less than 40 minutes and $24.00 for periods of 40 minutes or more." The "Facts" of the grievance provide, "Elementary enrichment teachers have been assigned cafeteria duty without compensation."

21. On January 29, 2020, VDPS denied the grievance. The School District gave three reasons for its denial. The first was timeliness. The second was that there was "no contract violation." The third was that "[t]eacher assignment is a prohibited subject of bargaining and is not legally subject to the grievance procedure. Further pursuit of this grievance will amount to an unfair labor practice."

22. Thereafter, on February 10, 2020, Ms. Dutton notified Ms. Bognar of the PPVD's intent to file a demand for arbitration on Grievance 2020-01, and then

filed said Demand on February 17, 2020, with the American Arbitration Association.

23. All elementary enrichment teachers have been paid a full salary as a 1.0 FTE teacher for the 2019-20 school [year].

24. The workday for elementary teachers is 7 hours and 22 minutes (Article V, A., p. 21 of the CBA). The salary schedule for members of PPVD is set out in the CBA (Article II, Schedule A, p. 4). For the 2019-2020 school year, teachers have 183 contractual workdays.

25. The elementary enrichment teachers' classroom schedules do not amount to a 1.0 FTE.

26. VDPS has assigned teachers to non-teaching supervisory duties, including lunchroom supervision, in the past in order to allow teachers to keep a 1.0 FTE schedule. In those circumstances, it has not paid extra duty pay for those teachers and the assignment was not grieved by the PPVD.

Discussion:

I. The Employer's Response to the Union's June 8, 2021 Brief in Reply.

On June 18, 2021, the Employer filed a response to the Union's Brief in Reply in which it "interprets" the Brief in Reply as cross-exceptions under 176(8) of the Commission's General Rules. According to the Employer, the Union's brief constitutes cross-exceptions because the brief contests portions of the ALJ's decision even though it supports the ALJ's ultimate conclusion that Union did not commit an unfair labor practice.

In *Kalamazoo County*, 22 MPER 94 (2009), the charging party filed exceptions to an ALJ's Decision and Recommended Order and a brief in support of its exceptions. The respondents filed a brief in support of the ALJ's Decision and Recommended order. The charging party then filed both a motion to strike a portion of respondents' brief and a reply brief in support of its exceptions. In its motion to strike, the charging party argued that respondents' brief in support of the ALJ's Decision and Recommended Order did not comply with Rule 176 because it asked the Commission to reject certain ALJ findings to which no exceptions were filed. The respondents asked the Commission to strike the charging party's reply brief in support of charging party's exceptions. In affirming charging party's contention that certain parts of respondents' brief that take issue with the ALJ's decision should be stricken, the Commission held:

> Rule 176 provides that parties shall file exceptions to the ALJ's Decision and Recommended Order within twenty days of its issuance. Generally, arguments in support of a party's exceptions may be included in a supporting brief filed with the exceptions. A

> party may file cross-exceptions or a brief in support of the decision and recommended order within ten days of service of the other party's exceptions. Rule 176 also provides that any exception "that is not specifically urged is waived" and an exception that fails to comply with Rule 176 may be disregarded. The Commission's rules do not provide for a reply to a brief supporting the ALJ's Decision and Recommended Order. See *Washtenaw Co*, 21 MPER 38 (2008).
>
> In this case, Respondents did not file exceptions or cross-exceptions. Respondents' only mention of disagreement with anything in the ALJ's Decision and Recommended Order is in their brief in support of the ALJ's decision. To have the Commission consider their arguments opposing the ALJ's decision, Respondents were required to file cross-exceptions. Had Respondents filed cross-exceptions, Charging Party would have been entitled to respond to them. See *City of Grand Rapids*, 19 MPER 69, n 1 (2006). See also *Seventeenth Dist Court (Redford Twp)*, 19 MPER 88 (2006).
>
> In its motion to strike, Charging Party contends that the passages in Respondents' brief that take issue with the ALJ's decision should be stricken and should not be considered by this Commission because they fail to conform to the requirements of Rule 176. We agree. Charging Party's motion to strike is granted. The portions of Respondent's brief in support of the ALJ's decision that take issue with the ALJ's decision are stricken and will not be considered (footnotes omitted).

Here, unlike in *Kalamazoo County*, Respondent did not move to strike the portions of the Union's "Brief in Support" which took issue with the ALJ's findings. Although the Union contends that it did not request that the ALJ's decision be corrected or modified, its brief asserts that the Commission should adopt the ALJ's decision and dismiss the charge because the ALJ had reached the correct conclusions albeit for the wrong reasons. Consequently, we will not consider the Union's Brief in Reply a "legal memorandum in support of the decision and recommended order," as we are urged to do by the Union, and instead find it to constitute "cross exceptions" under Rule 176(8). See *Plymouth-Canton Community Schools*, 32 MPER 54 (2019). As such, we will accept the Employer's June 18, 2021, response to the Union's Brief in Reply and deny the Union's Motion to Strike.

II. Whether Grievance 2020-01 Implicated a Prohibited Subject of Bargaining.

A. 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). While PERA requires bargaining on some subjects, Section 15(3) sets forth subjects that 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). 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*, 212 Mich App 472, 487 (1995).

2011 PA 103 expanded the list of prohibited subjects of bargaining and added Section 15(3)(j), which expanded the prohibited subjects of bargaining to include:

> Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.

The issue of whether a party violates its duty to bargain by seeking to arbitrate a grievance over a prohibited subject of bargaining 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 went on to explain in *Ionia, Shiawassee*, and *Pontiac,* that grievance arbitration regarding a prohibited subject of bargaining constitutes an effort to unlawfully enforce contract provisions or other agreements that have been made unenforceable by 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 Scho*ols, 31 MPER 61 (2018).

B. <u>Application to the Present Dispute</u>

In the present case, due to declines in enrollment, the Employer was not able to schedule elementary enrichment teachers with enough classes to fill a 1.0 FTE schedule. As a result, Elementary enrichment teachers were assigned to lunchroom supervision duties to fill out the remainder of their schedule (Stip, ¶ 5). The Union demanded that the Employer bargain about the assignment of staff, asserting that professionals should not be required to engage in lunchroom supervision (Stip, ¶ 7). The parties discussed the issue but did not reach an agreement (Stip, ¶ 8-17). The Union notified the Employer that it would apply for mediation (Stip, ¶ 18). The Employer, however, advised the Union that it viewed the issue of assignment to the cafeteria as a placement issue that was not subject to bargaining (Stip, ¶ 19, Ex K).

Thereafter, it appears that the Union abandoned its effort to bargain over the issue of assignment of teachers to the cafeteria, and no grievance or charge was pursued. The Union did,

however, notify the Employer that, if professionals were to be assigned to the cafeteria, these employees were entitled to compensation as required by Article II, Extra Duty (5) of the collective bargaining agreement.

A grievance was then submitted regarding cafeteria duty compensation, Grievance 2020-01 (Stip, ¶ 20, Ex. L). The face of the grievance did not challenge the assignment of staff to the cafeteria. To the contrary, the grievance assumed that the assignment had been properly made. The grievance, however, asserted that the Employer violated: "Article II – Salary Schedule – Extra Duty" and went on to assert that the violation was Subsection 5 thereof which provides that: "Teachers working cafeteria duty will be paid $22.00 for periods less than 40 minutes and $24.00 for periods of 40 minutes or more." The "Facts" of the grievance note, "Elementary enrichment teachers have been assigned cafeteria duty without compensation" (Stip, ¶ 20, Ex. L).

The Employer denied the grievance, asserting that further pursuit of the grievance "will amount to an unfair labor practice" (Stip, ¶ 21, Ex. M). The Union then submitted a demand for Arbitration (Stip, ¶ 22), as a result of which the Employer filed the instant charge.

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." Contrary to the ALJ, we find no basis in the record to support the ALJ's conclusion concerning the subject matter of the grievance. Rather, we find 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.

The Union asserts in its "brief in reply", which we have deemed to constitute cross-exceptions that "the Administrative Law Judge failed to view the union's grievance as it was filed and concluded that the grievance sought a remedy it did not claim. . . the Union wants the Employer to be compelled to pay employees as required by the collective bargaining agreement. The grievance does not implicate, much less challenge, a prohibited subject for bargaining. While the reasoning of the Administrative Law Judge proceeded from an incorrect premise, he reached the correct conclusion". We agree with the Union's assertions and reject the ALJ's conclusions concerning the substance and purpose of the grievance.

Furthermore, since we have determined that the grievance did not implicate a placement decision, we agree with the Union's position that the consideration or application of our prior decision in *Garden City Education Assn and Garden City Public Schools*, 34 MPER 19 (2020) is unnecessary to reach a determination over the issues in this case.

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. 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). Stated differently, Grievance 2020-01 does not attempt to obtain a contract right or benefit that could not itself be bargained. See *Michigan Education Association v. Vassar Public Scho*ols, 31 MPER ¶ 61 (2018), (an arbitration panel cannot issue an award when the parties do not have a duty to bargain over a subject). Consequently, Grievance 2020-01 did not implicate a prohibited subject of bargaining.

In its exceptions, the Employer admits that Grievance 2020-01 asserted that the School District violated an "extra duty" provision of the collective bargaining agreement between the Parties, and that the underlying rationale of the grievance was that "elementary enrichment teachers were assigned to cafeteria duty without being paid compensation delineated in the 'extra duty' provision." The Employer nonetheless maintains that Grievance 2020-01 "was a smokescreen" that actually pertained "to a prohibited subject," as implicated by the Union's October 14, 2019, prior demand to bargain (Ex. A) and a grievance filed on November 8, 2019 (Employer's Brief on Exceptions, pp. 16-18).

We recognize that Stip, ¶ 12 and 13 refer to Grievance 2019-03 filed on November 8, 2019 over "the notified reduction of the elementary enrichment teachers' schedules" (Exhibit F). However, although that grievance could have implicated a prohibited subject of bargaining under Section 15(3)(k) of PERA (staffing reduction) (see footnote 1 of the ALJ's decision), there is no dispute that it was abandoned by the Union (Employer's Brief on Exceptions, p. 18), and is not the grievance involved in this dispute. Likewise, although Union President Dutton sent the Employer's Personnel Director and Superintendent a demand to bargain regarding the assignment of lunch supervisory duties on October 14, 2019 (Ex. A), the demand was abandoned once the Employer refused to discuss it further. Moreover, the demand to bargain concerned the assignment of duties to a position or positions, a matter that appears to be covered by Article II, and did not involve the assignment of an individual to a position or job under Article VII. The Employer does not dispute that Article II, Subsection 5, may be an enforceable part of a collective bargaining agreement provided that the teachers who are required to perform cafeteria duty are performing work that is extra duty and not part of the core duties of an assignment. Consequently, we find there is insufficient evidence to conclude that Grievance 2020-01 "was a smokescreen" that actually pertained "to a prohibited subject" of bargaining.

Lastly, the Employer argues that Grievance 2020-01 involves an improper interpretation of Article II because, when read contextually, Subsection 5 of Article II can only refer to teachers who work cafeteria duty *in addition to* their normally scheduled workday, or who work cafeteria duty during their duty-free lunch. 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.

Accordingly, we find, consistent with the ALJ, that the Union did not violate 10(2)(d) of PERA by pursuing and seeking to arbitrate Grievance 2020-01.

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 only to the extent set forth herein and issue the following order.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: October 12, 2021

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

In the Matter of:

THE PROFESSIONAL PERSONNEL OF
VAN DYKE,
Respondent-Labor Organization,

Case No. 20-C-0554-CU
Docket No. 20-006088-MERC

-and-

VAN DYKE PUBLIC SCHOOLS,
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Appearances:

Cousens Law, by Mark H. Cousens, for the Respondent

Lusk & Albertson, PLC, by Robert T. Schindler and Adam J. Walker, for the Charging Party

DECISION AND RECOMMENDED ORDER OF
ADMINISTRATIVE LAW JUDGE

On March 10, 2020, Van Dyke Public Schools (Charging Party or District) filed the present unfair labor practice charge against The Professional Personnel of Van Dyke (Respondent or Union). 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 Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, formerly the Michigan Administrative Hearing System (MAHS), on behalf of the Michigan Employment Relations Commission.

Unfair Labor Practice Charges and Procedural History:

The District claims that the Union's attempt seek an arbitrator's review of its unilateral decision to assign certain elementary school teachers to a lunch supervisory period as part of their normal daily schedule involves a prohibited subject of bargaining under PERA and therefore violates the Union's duty to bargain in good faith under Section 10(2)(d) of the Act.

Several prehearing conferences were conducted with the parties. Eventually it was agreed that the present dispute could be decided through factual stipulations and briefing by the parties. On September 3, 2020, the parties submitted their stipulations of fact as well as an agreed upon briefing schedule. Initial briefs were received on September 29, 2020, and September 30, 2020. Reply briefs were received on October 14, 2020. Based upon the entire record, including the

stipulation of facts and the exhibits agreed upon by the parties, I make the following conclusions of law and recommended order.

Stipulations of Fact:

1. Charging Party Van Dyke Public Schools (VDPS) is a public school employer as defined by the Public Employment Relations Act (PERA).

2. Respondent Professional Personnel of Van Dyke (PPVD) is the sole and exclusive bargaining representative of teachers and other certified professionals employed by VDPS (as defined within the relevant collective bargaining agreement between the parties).

3. The PPVD bargaining unit includes elementary enrichment teachers – i.e., teachers that are certified and assigned to teach non-core subjects such as art, music, physical education, and technology.

4. Due to declines in enrollment, VDPS was not able to schedule elementary enrichment teachers with enough classes to fill a 1.0 full time equivalency (FTE) schedule.

5. As a result, Elementary enrichment teachers were assigned to lunchroom supervision duties to fill out the remainder of their schedule.

6. None of the elementary enrichment teachers had their schedules reduced from a 1.0 FTE.

7. On October 14, 2019, the PPVD President, Val Dutton, sent to VDPS Personnel Director Edie Valentine and Superintendent Piper Bognar a demand to bargain relative to the assignment of lunch supervisory duties.

8. On October 21, 2019, VDPS administrators and PPVD representatives met in an effort to resolve the matter.

9. Following the meeting, on October 22, 2019, Ms. Valentine sent an email to Ms. Dutton as a follow-up to the PPVD demand to bargain. In that email, Ms. Valentine explained: "we will review the elementary enrichment schedule issue further in an attempt to find a resolution without having to engage in bargaining."

10. On October 29, 2019, Ms. Valentine emailed Ms. Dutton with a proposed modification of the enrichment schedules, which removed lunch supervision and replaced it with building support – which included possible lunch supervision, among other activities.

11. On October 30, 2019, Ms. Dutton responded, indicating that the assignment of

lunch supervision as a possibility remained unacceptable.

12. On November 6, 2019, Ms. Valentine sent an email to Ms. Dutton indicating that, since the possibility of lunch supervision was unacceptable to the PPVD, the School District would reduce the enrichment teachers' schedules by removing the unassigned minutes. As a result, the elementary teachers would be subject to a partial layoff and reduction in compensation. That reduction varied by teacher and was specifically listed for each teacher in the email.

13. On November 8, 2019, the PPVD filed a grievance relative to the notified reduction of the elementary enrichment teachers' schedules.

14. On November 14, 2019, VDPS and PPVD representatives met to discuss the grievance. At this meeting, the parties agreed there would be no reduction to the elementary enrichment teachers' schedules pending continued discussions relative to the duties assigned during the unassigned portion of the elementary enrichment teachers' work day.

15. On November 18, 2019, Ms. Valentine emailed Ms. Dutton and proposed that the number of days an elementary enrichment teacher would be given lunch supervision during their unassigned time would be dependent on the number of unassigned blocks per week the teacher had.

16. On November 20, 2019, Ms. Dutton responded to Ms. Valentine by email and requested to meet after Thanksgiving.

17. On December 8, 2019, Ms. Dutton emailed Ms. Valentine and proposed that, instead of lunch supervision, elementary enrichment schedules be adjusted to allow for a transition time and that the remainder of unassigned time be devoted to building support that did not include lunch supervision.

18. When the School District would not agree to Ms. Dutton's proposal, Ms. Dutton indicated the PPVD would be filing for mediation to resolve the dispute.

19. On January 10, 2020, Ms. Valentine responded to Ms. Dutton by email, indicating that teacher placement and assignments are prohibited subjects of bargaining. Ms. Valentine further communicated that it would not move forward with mediation and, if the PPVD continued to persist, would file an Unfair Labor Practice (ULP) against the PPVD.

20. On January 22, 2020, the PPVD then filed Grievance 2020-01. Grievance 2020-01 asserted that the School District violated: "Article II – Salary Schedule – Extra Duty." The grievance went on to assert that the violation was subsection 5 thereof stating: "Teachers working cafeteria duty will be paid $22.00 for periods less than 40 minutes and $24.00 for periods of 40 minutes

or more." The "Facts" of the grievance provide, "Elementary enrichment teachers have been assigned cafeteria duty without compensation."

21. On January 29, 2020, VDPS denied the grievance. The School District gave three reasons for its denial. The first was timeliness. The second was that there was "no contract violation." The third was that "[t]eacher assignment is a prohibited subject of bargaining and is not legally subject to the grievance procedure. Further pursuit of this grievance will amount to an unfair labor practice."

22. Thereafter, on February 10, 2020, Ms. Dutton notified Ms. Bognar of the PPVD's intent to file a demand for arbitration on Grievance 2020-01, and then filed said Demand on February 17, 2020, with the American Arbitration Association.

23. All elementary enrichment teachers have been paid a full salary as a 1.0 FTE teacher for the 2019-20 school [year].

24. The work day for elementary teachers is 7 hours and 22 minutes (Article V, A., p. 21 of the CBA). The salary schedule for members of PPVD is set out in the CBA (Article II, Schedule A, p. 4). For the 2019-2020 school year, teachers have 183 contractual work days.

25. The elementary enrichment teachers' classroom schedules do not amount to a 1.0 FTE.

26. VDPS has assigned teachers to non-teaching supervisory duties, including lunch room supervision, in the past in order to allow teachers to keep a 1.0 FTE schedule. In those circumstances, it has not paid extra duty pay for those teachers and the assignment was not grieved by the PPVD.

Discussion and Conclusions of Law:

The sole issue confronting the undersigned is whether the Union violated Section 10(2)(d) of PERA by pursuing and arbitrating a grievance challenging the school district's unilateral decision to assign certain elementary teachers to a lunch supervisory period as part of their normal daily schedule. To be clear, other issues relative to the underlying dispute, including but not limited to, whether the contract allows the District's actions, whether the teachers are entitled to extra pay as result of the assignment and/or whether an ultimate decision by an arbitrator could result in certain teachers working less then a 1.0 FTE and therefore end up on partial lay-off are immaterial to this discussion.[1]

[1] I would note that any decision by the District to layoff these teachers in a partial form would be unassailable under the parties' grievance procedure because teacher layoff and the effects and decision surround such is a prohibited subject of bargaining. See MCL 423.215(3)(k).

Section 15 of PERA places a duty on a public employer to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. In addition to mandatory subjects of bargaining, the Commission also recognizes permissive subjects and illegal or prohibited subjects. Permissive subjects are those that the parties can, if they choose, bargain over, but are not required to do so. Illegal or prohibited subjects are those subjects that the parties cannot bargain over, even if they would otherwise like to do so.

In 1994, with the passage of Public Act 112 (PA 112), the scope of bargainable issues was significantly narrowed by the Legislature. PA 112 made certain decisions by public school employers prohibited subjects of bargaining, 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. While the definition or scope of the term "prohibited subject" was not articulated in PA 112, 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). Applying the Court's rational regarding a prohibited subject, the Commission has held that because grievance arbitration is an extension of the collective bargaining process, a labor organization representing public school employees violates Section 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).

In 2011, the Legislature added to the existing list of prohibited subjects of bargaining through Public Act 103 (PA 103). 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, the public school employer's performance evaluation system, classroom evaluations and parental notification of ineffective teachers. The 2011 amendments to PERA also included the addition of Section 15(3)(j), which prohibits a public school employer and labor union from bargaining over "Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit."

Until most recently, the Commission and the courts have interpreted Section 15(3)(j) broadly, concluding that the plain language of the statute gives public school employers broad discretion to make decisions concerning teacher placement, including assignments, reassignments and transfers. See e.g. *Ionia Public Sch v Ionia Ed Ass ' n*, 311 Mich App 479 (2015); *Pontiac Sch Dist*, 27 MPER 60 (2014), aff'd *Pontiac School Dist v Pontiac Ed Ass ' n*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 321221) [see 29 MPER 18].

In *Ionia*, 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), the employer had no duty to bargain with the union over the discontinuation of that procedure.

At issue in *Pontiac Sch Dist* was the public school employer's decision to withdraw from a settlement agreement limiting its use of long-term substitutes to fill vacant teaching positions instead of hiring teachers. As part of the settlement agreement, the employer had acknowledged the recall rights of teachers, made the recall of one specific teacher effective immediately, and promised to recall four other teachers as soon as possible. The Commission concluded that the agreement to recall teachers and place them in vacant positions was "an agreement regarding teacher placement" which could not lawfully be bargained under Section 15(3) of the Act. For that reason, the Commission dismissed the union's charge. The Court of Appeals affirmed the Commission's decision, finding that the settlement agreement "clearly contravenes Section 15(3)(j)'s prohibition on collective bargaining of '[a]ny decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee . . . .'" *Pontiac Sch Dist v Pontiac Education Ass ' n*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 322184) [29 MPER 19].

Most recently, in *Garden City Education Ass'n and Garden City Public Schools,* 34 MPER 19 (2020), the Commission was faced with the question of whether a school district's unilateral discretion extended to the placement of a teacher into a co-curricular, non-teaching position, in that case a coaching position. A Commission majority ruled that the district's authority over teacher placement did not extend to non-curricular assignments or decisions. In considering the scope of the term, teacher placement, and its application, the Commission stated:

> [We] conclude, in light of the statutory scheme and the context in which it used, that the plain and ordinary meaning of the phrase "teacher placement" is placement in a school, course, classroom, or other curricular assignment. It does not extend to additional part-time co-curricular assignments. The Teacher Tenure Act defines "teacher" as a "certificated individual employed for a full school year by any board of education or controlling board." Webster's relevantly defines "placement" as "the assignment of a student to a class or course on the basis of his ability or proficiency in the subject" and "the assignment of a worker to a suitable job." Merriam-Webster Unabridged Dictionary (online ed 2020) (definition of "placement"), https://unabridged.merriam-webster.com/unabridged/placement. The American Heritage Dictionary similarly defines "placement" as "[t]he finding of suitable accommodation or employment for applicants" and "[a]ssignment of students to appropriate classes or programs."
>
> In line with these definitions, the ordinary meaning of the phrase "teacher placement" embraces the assignment of teacher to the jobs for which they are certified—particular classes, courses or subjects. Assignment to a purely co-curricular position, which is an additional assignment beyond the teacher's principal job, and for which no certification is necessary, is not a "teacher placement" decision. All the more so where, as here, the Employer has specifically described the position as a "non-teaching" position. That is true even if it is a teacher who receives or desires the assignment in a particular case. If a

> school conducts weekly team-building activities after the end of the school day, and the responsibility for providing refreshments rotates among staff members, the decision that a particular teacher must provide refreshments on a particular week is not a "teacher placement" decision. It is a decision assigning a task to a teacher, but it is not a decision assigning that individual a task as a teacher. We reach this conclusion by examining the plain meaning of the phrase "teacher placement."
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> The plain text of Section 15(3)(j) does not privilege a public school employer to make any decision in the entire universe of decisions. It very specifically privileges only the making of any decision regarding teacher placement. As such, the question is whether the refusal to assign a teacher to a co-curricular coaching position, which requires no teaching certificate, need not be filled by a teacher, and which the employer stipulated is a "non-teaching" position, constitutes "teacher placement." We believe that it does not. The plain meaning of the phrase "teacher placement" is placement of a teacher in, or relating to, a teaching position—that is, the placement of a teacher in a school, course, classroom, or other curricular assignment.

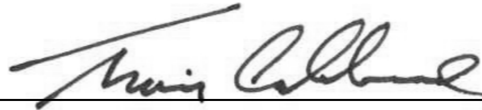
In the present case, the District made the unilateral decision to take certified teachers and utilize them for lunch-room supervision. The Union has chosen to dispute that decision and has sought to place it before an arbitrator. The parties' stipulated facts do not establish any requirement, and the undersigned is unaware of any such requirement, that lunch-room supervision be conducted by certificated teachers. Applying the present situation to the standard as set forth in *Garden City Education Association,* supra, it is my finding that lunch-room supervisions is not the sort of assignment similar to "school, course, classroom, or other curricular assignment" that would place it under the definition of "teacher placement" as contemplated by Section 15(3)(j) of the Act. As such, I find that the Union did not breach its duty under 10(2)(d) of PERA by pursuing and seeking 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.

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, 2021