STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GARDEN CITY EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

MERC Case No. CU18 F-020

-and-

GARDEN CITY PUBLIC SCHOOLS,
Public Employer-Charging Party.
_____/

APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue, for Respondent

Miller Canfield Paddock & Stone, PLC, by John H. Willems, for Charging Party

DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION

On October 22, 2020, the Commission issued its Decision and Order in this matter, finding that Respondent did not breach its duty to bargain in good faith by arbitrating a grievance over the Charging Party School District's decision not to fill a Schedule B position with a certificated teacher who applied for that position. Consequently, we affirmed the ALJ's decision and adopted the recommended Order to dismiss the charge in its entirety as our final Order. See *Garden City Education Association, MEA/NEA*, 34 MPER 19 (2020).

Charging Party filed a Motion for Reconsideration of our Decision and Order on November 11, 2020, and submitted a brief in support of the motion. Respondent did not file a response to the motion.

Motions for Reconsideration are governed by Rule 167 of the Commission's General Rules, 2002 AACS, R 423.167, which states in pertinent part:

> A motion for reconsideration shall state with particularity the material error claimed. . . . Generally, and without restricting the discretion of the commission, a motion for reconsideration which merely presents the same issues ruled on by the commission, either expressly or by reasonable implication, will not be granted.

In its Motion for Reconsideration, Charging Party essentially presents the same issues already addressed by this Commission in our October 22, 2020 Decision and Order. In addition, Charging Party devotes a significant portion of its Motion to the assertion that the case should be

remanded so that it can present evidence it either elected not to present, or failed to present, during the hearing before the ALJ. As we indicated in our Decision, the Charging Party has waived its right to present such evidence by failing to present it before the ALJ. For the foregoing reasons, we find that the Charging Party has failed to provide sufficient grounds for reconsideration. See *AFSCME Council 25, Local 2394*, 28 MPER 41 (2014) and *City of Detroit Water & Sewerage Dep ' t*, 1997 MERC Lab Op 453.

ORDER

The motion for reconsideration is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair

Robert S. LaBrant, Commission Member

Tinamarie Pappas, Commission Member

Issued: January 12, 2021

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White Schneider PC, by Jeffrey S. Donahue, for Respondent

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DECISION AND ORDER

In 2017, the Garden City Public Schools (Employer) gave a co-curricular assignment as a soccer coach to a non-teacher outside of the bargaining unit represented by the Garden City Education Association, MEA/NEA (Union), even though a teacher in the unit sought that assignment. The Union believed that the Employer's action violated the terms of their collective bargaining agreement, and it eventually sought arbitration of the matter. The Employer responded by filing unfair labor practice charges with the Commission. By this opinion, we dismiss those charges.

The Employer contends that the decision of whom to assign to the coaching position was a "teacher placement" decision over which either bargaining or contract enforcement actions were prohibited under Section 15(3)(j) of the Public Employment Relations Act (PERA). It thus claims that the Union violated its duty to bargain in good faith under Section 10 of PERA by pressing its grievance to arbitration. On December 3, 2019, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] recommending that the charge be dismissed. The ALJ concluded that the assignment of an individual to a co-curricular coaching

[1] MOAHR Hearing Docket No. 18-012974

position—one that the Employer stipulated was a "non-teaching" position—did not constitute a "teacher placement" decision under PERA. We agree with the ALJ and affirm.[2]

Facts:

The Employer and Union are parties to a collective bargaining agreement effective from September 1, 2015, through August 31, 2018. The bargaining unit includes all certificated and/or professional personnel employed by the school district including, but not limited to, certified teachers, counselors, psychologists, social workers, coordinators, driver education instructors, librarians, consultants and "all positions listed in Schedule B" of the agreement. The parties specifically stipulated before the ALJ that "Schedule B of the CBA sets forth the wages for *non-teaching positions* (termed co-curricular positions), such as athletic coaching, for which bargaining unit members may apply" (emphasis added). Included among the Schedule B co-curricular positions is that of varsity high school soccer coach. Article V of the collective bargaining agreement sets forth the process for posting of vacant extra-curricular/co-curricular positions, and notification to bargaining unit employees of the available openings for such positions. The Agreement also includes a grievance procedure culminating in final and binding arbitration.

On February 14, 2017, the Employer awarded a vacant co-curricular position for high school boys' varsity soccer coach to someone outside of the bargaining unit rather than to a certified teacher who had applied for the position. The Union filed a timely grievance over the Employer's award of the coaching position (which it characterized as "outsourcing"). The Union maintained that a past practice existed whereby the provisions of Article V had been applied to give preference for open Schedule B positions to bargaining unit employees over outside applicants. The Employer denied the grievance. It asserted that no violation of the contract had occurred, and, additionally, that the Union was pursuing a grievance over a prohibited subject of bargaining involving a "teacher placement" decision. The Union appealed the grievance to arbitration. Shortly thereafter, the Employer filed this unfair labor practice charge. It alleged that the Union had violated PERA by advancing to arbitration a grievance over a "teacher placement" decision, a prohibited subject under Section 15(3)(j).[3]

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[2] The parties elected to have this matter decided by the ALJ based on stipulated facts and exhibits. The parties filed respective motions for summary judgment and supporting briefs. The Employer also filed a reply to the Union's motion for summary judgment. Following issuance of the arbitrator's award both parties filed supplemental briefs. We adopt the facts as set forth in the ALJ Decision, where not otherwise repeated, supplemented or modified herein.

[3] The parties stipulated to the following conditions for the arbitration: (1) The parties would proceed with the arbitration since outsourcing of the coaching position could impact both teacher and non-teacher members of the bargaining unit; (2) the arbitration award as it related to teacher members of the bargaining unit would be deferred pending the outcome of the Commission proceeding; (3) the grievance would be tried solely as a class action grievance with no individual remedy either sought or awarded; (4) the parties would not be precluded from submitting evidence regarding the historical or current placement or non-placement of teachers into Schedule B positions; (5) if the arbitrator denied the grievance, the award would immediately apply only to non-teacher members of the bargaining

1. The 2011 Amendments to PERA

PERA governs the relationship between public employers and the labor organizations representing their employees. *Macomb Co. v. AFSCME Council 25,* 494 Mich. 65, 77–78; 822 N.W.2d 225, (2013) *Van Buren County Educ. Ass'n & Decatur Educ. Support Pers. Ass'n, MEA/NEA v. Decatur Pub. Sch.*, 309 Mich. App. 630, 640; 872 N.W. 2d 710 (2015). With limited exception, Section 15(1) of PERA imposes upon all public employers a mandatory duty to bargain over "wages hours, and other terms and conditions of employment . . . ." MCL 423.215(1). Section 15(3) identifies the subjects over which public school employers and the labor organizations representing their employees are prohibited from bargaining.

Section 15(3)(j) prohibits 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." The Legislature added that provision in 2011 as part of Public Act 103 (PA 103), which embraced several pieces of tie-barred legislation promoting flexibility in school systems' curricular decisions. PA 103 expanded the list of prohibited subjects of bargaining between public school employers and their employees' bargaining representatives. Also included among PA 103's prohibited subjects are decisions concerning: (1) teacher hiring, layoffs and/or recalls from layoff; (2) the discharge or discipline of an employee whose employment is regulated by the Teacher Tenure Act (TTA), MCL 38.71 et seq.; (3) the performance evaluation system and content of same; (4) the format and number of classroom observations for the purpose of performance evaluations, and; (5) the method of performance-based compensation.

The Commission and Michigan Courts have interpreted the term "placement" in Section 15(3)(j) to include assignments, reassignments and transfers of teachers. See e.g. *Ionia Public Schools v Ionia Ed Ass'n*, 311 Mich App 479; 875 N.W.2d 756 (2015); *Pontiac School District*, 27 MPER 60 (2014), aff'd *Pontiac School Dist v Pontiac Ed Ass'n*, MI Court of Appeals unpublished per curiam opinion (Docket No. 321221, Sept. 15, 2015).

Section 10 of PERA imposes the duty to bargain in good faith on both employers and labor organizations. MCL 423.210 (1)(e) and (2)(d). A party who insists on bargaining over a prohibited subject has bargained in bad faith in violation of the Act. *Calhoun Intermediate Education Ass'n., MEA/*NEA, 28 MPER 26 (2014). A prohibited subject cannot become an enforceable part of a collective bargaining agreement. *Michigan State AFL-CIO v. MERC*, 212 Mich App 472, 487; 212 N.W. 2d 472 (1995); aff'd 453 Mich 362; 551 N.W. 2d 165 (1996); *Pontiac School District*, 28

unit pending a final decision by the Commission on the charge; (6) if the Commission dismissed the Employer's charge, the arbitration award would prospectively apply to all bargaining unit members, however if appealed and reversed, the arbitration award as to teaching members would be null and void and the award would apply only to non-teaching members; (7) if the arbitrator granted the Employer's grievance, and the Commission found merit to the unfair labor practice charge, the award would apply only to non-teacher unit members, unless reversed on appeal in which case the award would apply to all bargaining unit members.

MPER 34 (2014); *Ionia County Intermediate Educ. Ass'n,* 30 MPER 18 (2016); *Shiawassee Intermediate School Dist. Educ. Ass'n*, 30 MPER 13 (2016). As such, we have held that a party who attempts to enforce a prohibited provision through a contractual grievance-arbitration process has violated the Act by bargaining in bad faith. *Michigan Education Association, MEA/NEA*, 30 MPER 62 (2017); *Ionia, supra; Shiawassee, supra; Pontiac, supra*.

2. The Parties' Contentions

The Employer argues that the ALJ erred in dismissing the charge. It asserts that the Union violated PERA by pursuing to arbitration a grievance challenging the decision not to fill a co-curricular coaching position with a certified teacher who applied for that position. It contends that the issue raised by the grievance involves a teacher placement decision and, is, therefore a prohibited subject of bargaining under Section 15(3)(j). The Employer urges us to find that Section 15(3)(j)'s prohibition on bargaining over "teacher placement" decisions is applicable to any placement decision involving a teacher, whether the position in question is a certified teaching position or a non-teaching position. In short, the Employer maintains that the phrase "teacher placement" means *any* assignment, to any duties, of a person who happens to be a certified *teacher*.

Conversely, the Union argues that the ALJ properly dismissed the charge based on his determination that Section 15(3)(j) did not apply to the Employer's refusal to award to a certified teacher, a non-teaching, co-curricular coaching position. In that regard, the Union maintains that the bargaining prohibition under Section 15(3)(j) is limited to the placement of a certified teacher into a certified teaching position. Here, because the Employer's job award did not involve placement into a certified teaching position—and, indeed, the Employer specifically stipulated below that the coaching assignment was a "non-teaching" position—the Union argues that no "teacher placement" decision was implicated. Accordingly, it contends that it did not violate PERA by pursuing the grievance to arbitration.

Discussion and Conclusions of Law

1. Legal Principles of Statutory Construction

This is a case of first impression for the Commission. We have not previously been presented with the issue of whether the phrase "teacher placement" under Section 15(3)(j) encompasses a teacher's request to be assigned to a co-curricular, non-teaching position.[4] The

[4] Neither party contends that Section 15(3)(j)'s prohibition on bargaining over "teacher placement" decisions applies to an individual who is a certified teacher but working in a non-certified professional, or other instructional, position. Although that issue was implicated in *Pontiac Education Association*, 28 MPER 34 (2014), we did not resolve it. There, we determined that the union had waived its right to assert that a speech pathologist was not a "teacher" for purposes of deciding whether Section 15(3)(j) prohibited the arbitration of a grievance on her behalf over the employer's transfer decision.

Michigan Supreme Court has repeatedly explained that the "goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass v Dept of Treasury*, 494 Mich 237, 247–48; 833 NW2d 272, 277 (2013) (internal quotation marks omitted). As the Court has recognized, "[t]he touchstone of legislative intent is the statute's language." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78, 84–85 (2008). "In every case requiring statutory interpretation," we must "seek to discern the ordinary meaning of the language in the context of the statute as a whole." *TOMRA of N Am, Inc v Dept of Treasury*, --- Mich ---; --- NW2d ---; 2020 WL 3261606, at *3 (Mich, June 16, 2020).

2. The Plain Meaning of "Teacher Placement"

Unlike the ALJ, we find little ambiguity in the phrase "teacher placement." Rather, 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." Am. Heritage Dictionary of the English Language (online 5th ed 2020) (definition of "placement"), https://ahdictionary.com/word/search.html?q=placement.

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

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Because we decided that the union had acquiesced to the employer's position by failing to object to repeated references to the speech pathologist as a "teacher" and "certified teacher", it was unnecessary for us to rule on whether the phrase "teacher placement" also applied to certified teachers working in non-certified professional or other "instructional" positions. It is likewise unnecessary for us to reach that issue in this matter, since there is no dispute that the individual impacted by the Employer's selection for varsity soccer coach was a certified teacher working in a certified teaching position.

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." Unlike the Administrative Law Judge, we find the language of Section 15(3)(j) unambiguous. As such, we find no additional statutory construction necessary.

The Employer focuses at length on the fact that the phrase "teacher placement" is preceded by the words "any decision," and followed by the phrase "or the impact of that decision on an individual employee or the bargaining unit." In an exercise in misdirection, the Employer urges the conclusion that those additional phrases evince an intent to expand the scope of teacher placement decisions to placement in any position, whether teaching or non-teaching. What the Employer conspicuously ignores, however, is that the meaning of *those* phrases are not at issue. The term whose meaning is in question is "teacher placement." The phrases emphasized by the Employer only serve to modify the phrase "teacher placement."

Specifically, the words "any decision" necessarily relate only to "teacher placement." Citing *Ionia Education Ass'n v. Ionia Public Schools,* 311 Mich. App 479, 875 N.W.2d 756 (2015), the Employer argues that the word "any" is broadly defined to mean "every" or "all," and, therefore, should be construed in the context of Section 15(3)(j) to allow unfettered decision-making discretion as it relates to teachers. The interpretation of the word *any,* however, is not the issue in this case. Rather, the issue in this case is how to interpret the phrase that "any" modifies.[5]

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."[6] We believe that it does not. The plain meaning of the phrase "teacher

[5] The issue in *Ionia* was how the words "any decision" were intended to be interpreted when applied to a public school employer's policies or procedures, there a bid-bump procedure, with regard to the assignment of teachers to particular courses or classes. The Court ruled that the plain language of the statute precluded bargaining over a bid-bump procedure, or any other procedure utilized in teacher placement. The Court further ruled that the phrase "teacher placement" did not limit the scope of an employer's decision-making to individual teachers. The facts under which the case was analyzed and decided involved teachers in *teaching positions* exclusively. No suggestion was made by either the Commission or the Court that decisions concerning "teacher placement" should be extended to the assignment of non-teaching co-curricular duties to teachers.

[6] The Employer likewise represented in both its Brief in Support of Summary Judgement, and again in its Supplemental Brief, that the bargaining unit in this matter consisted of both certificated teachers and *non-teaching* personnel. [Employer Brief in Support of MSJ, p. 5 ("certificated teachers and non-teaching personnel")]; [Supplemental Brief, p. 2 ("certified teachers, and non-teacher, non-certificated school personnel")].

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.

We likewise find no merit in the Employer's argument that the legislature's inclusion of the phrase "or the impact of that decision on an individual employee or the bargaining unit" evinces an intent to expand a public school employer's placement authority to non-teaching positions. Again, the Employer ignores the context in which the foregoing phrase appears. The phrase does not exist in a vacuum, and those words do not change the nature of the *decision* at issue. The only decisions implicated by Section 15(3)(j) are *teacher placement* decisions. The only *impact* on individual employees or a bargaining unit that are encompassed by Section 15(3)(j), are the impact of "*teacher placement*" decisions. And the decision at issue here is not a "teacher placement" decision.

In its Supplemental Brief to the ALJ following the arbitrator's award, the Employer suggested for the first time that the co-curricular coaching and other Schedule B positions should be deemed to be teaching positions "inside the frame of Section 15(3)(j)." The Employer asserts that these positions "involve the necessary elements of a 'teaching' activity: an adult with specialized knowledge and training leads a group of students through a study of principles and techniques- and their practice and application- with the intent of developing mastery of those principles and techniques in real-life situations." It further contends that "Schedule B positions involve the guidance and instruction of students in their subject matter, whether in sports, theater programming, arts and music performance or other areas."

We reject this alternate theory for a number of reasons. First, this case involves a single Schedule B position: that of varsity soccer coach. The level of "guidance" or "instruction" involved in any other Schedule B position is irrelevant. Second, it is undisputed that no teaching certificate is required to work in a Schedule B position. Third, the Employer stipulated to the characterization of Schedule B positions as "non-teaching" positions, and repeated that characterization in its briefs to the ALJ. Fourth, the Employer offered no evidence by way of stipulated facts, exhibits, or otherwise, to support the above-asserted description of co-curricular positions, and failed to raise the argument in either its initial or responsive brief to the ALJ. Lastly, because the record is devoid of any evidence concerning the specific duties and responsibilities of the varsity soccer coach position (or any other Schedule B position for that matter), much less the nature, extent, or intent, if any, of guidance or instruction given to students who participate in the sport at the varsity level, the Employer's assertions are wholly unsupported by the evidence presented in this case. There is absolutely no basis upon which such a determination could be made.

3. Administrative Construction of the Phrase "Teacher Placement," as Well as the Interpretation of that Phrase by the Courts of Other States, Reinforce the Plain Meaning

Administrative materials issued by the Michigan Department of Education (MDE), also refer to "teacher placement" in a manner consistent with our interpretation. MDE's publication entitled "Proper Placement Considerations," which by its terms sets forth criteria to assist school districts "with making a quick accurate decision on teacher placement," refers entirely to the assignment of teachers to particular classes or subjects, not to co-curricular assignments.[7] MDE's publication entitled "Appropriate Placement of Teachers" does likewise.[8] The same is true of MDE's publication entitled "Assignments for 'All Subjects' Endorsed Teachers," which purports to provide considerations to "guide the placement of teachers." MDE, "Assignments for 'All Subjects' Endorsed Teachers," 2019-7-9 v6. https://www.michigan.gov/documents/mde/Appropriate_Assignments_for El_Ed_217010_7.pdf.[9]

We also note that courts of other states have used the phrase "teacher placement" in the way we do in this opinion. See, e.g., *Johnson v Sch Dist No 1 in the Co of Denver*, 413 P3d 711, 714 (Colo, 2018) (using phrase "teacher placement" to refer to assignment of teacher to a particular school); *Jones v Dallas Indep Sch Dist*, 872 SW2d 294, 297 (Tex App, 1994) ("Jones does not question DISD's statutory authority to administer its alternative certification program and determine teacher placement within schools."); *Reilly v Sch Comm of Boston*, 362 Mass 689, 691; 290 NE2d 516, 517 (1972) ("The usual practice had been for the administrative head of a school desiring a daily substitute to call the teacher placement department of the school committee which would then routinely supply the substitute."); *Soria v. Oxnard Sch. Dist. Bd. of Trustees*, 488 F.2d 579, 583 (9th Cir. 1973) (using "teacher placement" to refer to the assignment of teachers to particular schools).

4. Legislative Analysis Further Refutes the Employer's Position

A review of the bill analysis prepared regarding the 2011 tie-barred legislation (PA 103) is instructive, not to divine the legislature's intent, or to interpret the phrase "teacher placement," but to refute the validity of the Employer's position. The legislative analysis describes the purpose of the four tie-barred bills as being "to ensure that ineffective teachers improve their practice or be removed from the teaching profession in a more timely manner," and setting "new standards with the aim of ensuring more effective teaching." See House Legislative Analysis, HB 4625, 4626,

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[7] MDE, "Proper Placement Considerations," 2019-3-13v9, https://www.michigan.gov/ documents/mde/ Proper_Placement_Considerations_526653_7.pdf.

[8] See MDE, "Appropriate Placement of Teachers," 2020-9-2 v4, https://www.michigan.gov/documents/mde/appropriate_placement_of_educators 629973_7.pdf

[9] The National Comprehensive Center for Teacher Quality similarly defines "teacher placement" as "the school for which teachers are hired." https://www.files.eric.ed.gov/fulltext/ED543675.pdf.

4627 & 4628, September 27, 2011. As reflected in the analysis, proponents of the changes urged that the proposed legislation "helps to assure that more of Michigan's K-12 students will have effective teachers who prepare and guide them to productive post-secondary work and higher education," and introduces a new teacher evaluation system based on "classroom observations." The entire focus of the proposed legislation as it related to "teachers," was the improvement of their role in classroom teaching, not a concern over their role, or participation in, non-teaching, co-curricular positions.

The Employer advocates for a ruling that the legislature meant the words "teacher placement" to encompass the various ways (i.e. assignment, layoff, recall, transfer, etc.) that a teacher can be placed into either a teaching or non-teaching position. But both the legislation when viewed in its entirety, and the legislative history, are devoid of any suggestion that the legislature was concerned with vesting the school districts, rather than teachers and their unions, with control of teachers' terms and conditions of employment when working in "non-teaching positions." The entirety of the legislative history emphasizes that the concern prompting the change in the law was the ability to efficiently, and without the constraints of collective bargaining, improve "teaching" and education by rewarding well-performing classroom teachers and penalizing sub-standard classroom teachers. The bill analysis is bereft of any discussion concerning a school district's ability to affect "placement" of individuals in non-teaching positions as a means to achieve the stated goal of better education outcomes. Consequently, the interpretation for which the Employer advocates is antithetical to a common sense reading of the statute when viewed in its entirety and is, therefore, inappropriate. *In re Consumers Energy*, 301 Mich App 614, 624; 874 N.W.2d 136 (2015)("When construing a statute, a court should not abandon the canons of common sense").

5. The Employer's Impermissible Segregation of the Word "Teacher"

The Employer's argument is unavailing for another reason: It selectively shifts the focus of the phrase "teacher placement" to the word "teacher" over the word "placement." But the statute does not isolate the word "teacher." That word must interpreted as part of the entire phrase "teacher placement." In urging that the statutory language means any placement of a "teacher," the Employer segregates that term from the entirety of the phrase at issue, and, by so doing, violates well-established principles of statutory construction. See, *Speicher v. Columbia Twp. Board of Trustees,* 497 Mich 125, 138; 860 N.W. 2d 51 (2014) ("It is equally well-established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters and thus, statutory provisions are to be read as a whole")("An attempt to segregate or exclude any portion of a statute from consideration is almost certain to distort legislative intent"). Further, any construction that "would render the statute, or any part of it surplusage or nugatory" is to be avoided. *McClellan,* supra at 403, citing *Karpinski v. St. John Hospital-Macomb Center Corp.*, 238 Mich. App. 539, 543; 606 N.W. 2d 45 (1999)(additional citation omitted).

In *Ionia,* the union's attempt to "segregate the phrase 'teacher placement' from the rest of the language employed in Section 15(3)(j) [was found to be] an inappropriate way to assess the

intent of the Legislature." *Ionia, supra* at 138. The Employer here does exactly what the *Speicher* Court cautioned against: It segregates the term "teacher" from the entirety of the phrase "teacher placement." That fact is evident in its various motions and briefs where it frequently italicizes the word "teacher" while leaving the word "placement" in unitalicized text. This case does not involve the random placement of a *teacher*: It involves *teacher placement*. When viewed in the context of the statutory scheme, the plain language of that term can only mean placement of a teacher into a teaching position.

In summary, we disagree with the Employer's position that "teacher placement" relates to any placement decision concerning a teacher without regard to whether the position is a classroom teaching position, or a non-teaching position. Neither the existing case law nor the legislative analysis support such an interpretation. While we certainly agree that the legislature has restricted the scope of bargaining for teachers through the years, and most particularly in the tie-barred legislation of PA 103, that is not the issue here. The question in this case is not whether the legislature has "transfer[red] power and bargaining leverage from teacher unions to public school employers" in some generic sense. It is whether the laws as *enacted* by the legislature made the matter at issue here a prohibited subject of bargaining. We do not believe they did.

Our dissenting colleague's result-oriented analysis and ultimate conclusion, lack any support in either law or fact. Instead, they rely upon on the misrepresentation of prior Court and Commission decisions, unsupported characterizations concerning the Legislature's intent, and the invention of a set of facts devoid of any supporting record evidence.

First, in disputing our assertion that this case is one of first impression, the dissent claims that the Commission and Court of Appeals have already determined the meaning of "teacher placement" in the cases of *Ionia Education Association v. Ionia Public Schools*, 311 Mich. App. 479, 875 N.W. 2d 756 (2015); and *Pontiac School District v. Pontiac Education Association, 28 MPER 34 (2014), aff'd unpub. Op. MI Court of Appeals (Docket No. 321221, Sept. 15, 2015).* We disagree. Absent a clear indication to the contrary, cases are decided on their specific facts, a premise ignored by the dissent. The cases relied upon by the dissent neither presented nor decided the issue involved in this case.

The issue in *Ionia* was whether the term "placement" within the phrase "teacher placement," was intended to apply to decisions over procedures for filling vacant teaching positions. Those positions had historically been filled during an annual "teacher assignment" or "bid-bump" meeting, during which teachers bid on open positions on the basis of certain criteria. All of the positions at issue in the case were classroom teaching positions. The Court of Appeals determined the phrase "any decision" as it related to "placement" in the context of the specific facts of the case, was intended to encompass both placement decisions as well as the procedures utilized for placement, so that the employer was relieved of complying with the contractual bid-bump process. Although the Court interpreted the words "any decision" broadly, on the facts of

the case, that interpretation was limited to "placement decisions" involving certified teachers into certified teaching positions.

The Court gave no indication of an intent to expand its ruling beyond the specific facts of the case. The decision is devoid of even one word suggesting that the Court intended the term "teacher placement" or even the phrase "any decision regarding teacher placement" to apply to a decision concerning the placement (or non-placement) of a teacher in a non-teaching position.

Consequently, when the Court stated that "the Legislature intended to remove from the ambit of bargaining any decision concerning the assignment or placement of teachers," it was addressing only the specific issue in that case: Whether the bid-bump procedure constituted a teacher placement decision for purposes of Section 15(3)(j). There was no other issue before the Court, and, therefore no basis for the dissent's broad characterization regarding the scope of the Court's ruling.

Indeed, the Court explicitly acknowledged that its ruling was limited to the application of the statutory language to the bid-bump process at issue before it, or issues "such as those." ("The broad language used in the statute necessarily includes any decision-making process as well; consequently, policies and procedures used to make teacher placement decisions *such as those in issue in the instant case* undoubtedly fall within the broad reach of "any decision"). *Ionia*, supra at 486.

The issue in this case is decidedly different from the bid-bump issue in *Ionia* which involved certified teachers moving in and out of certified teaching positions. Absent clear indication by the Court of an intent to expand its ruling beyond decisions, like those at issue there, that fit the plain meaning of "teacher placement," there is no basis for the dissent's assertion that the case "disposed of any argument" concerning the meaning of the terms of Section 15(3)(j).

In *Pontiac School District*, the issue was whether the term "teacher placement" encompassed the layoff of a high school speech pathologist and mandatory transfer to an elementary school, notwithstanding her request for transfer to a vacant middle school position. Although we found the case involved a "teacher placement" decision within the meaning of 15(3)(j), our decision was based on a determination that the union had waived its right to assert that the speech pathologist was not a certified teacher for purposes of Section 15(3)(j). We made no substantive determination or finding that the term "teacher placement" applies either to non-teachers or to non-teaching positions. Accordingly, our dissenting colleague's assertion that "the Commission *found* that the employer school district lacked any duty under Section 15(3)(j) to bargain over the transfer of a speech pathologist" is wholly unsupported.

As with *Ionia*, the issues involved in this case are strikingly different from those before the Court in *Pontiac*, because here they involve the placement of a teacher into a non-teaching position, an issue not before the Court there.

Perhaps recognizing the weakness of applying the rulings in *Ionia* and *Pontiac* to the facts of this case, the dissent, like the Employer, pivots to contend, in the alternative, that the co-curricular positions in this case were similar enough in nature to "teaching" positions to be properly encompassed by the word "teacher." In so doing, the dissent conspicuously ignores the Employer's stipulation that those positions are "non-teaching" positions. The dissent offers no support for the proposition that the Legislature intended to include such positions under the umbrella of Section 15(3)(j). Instead, the dissent bootstraps his assertion concerning the meaning of "teacher placement" in Section 15(3)(j) to the wholly unsupported claim that Schedule B co-curricular positions "involve the necessary elements of a teacher."

We feel compelled to underscore that this case involved a single Schedule B position within the Garden City Public School District: that of high school varsity soccer coach. No other co-curricular positions within any other school district were at issue in this matter, and certainly none of such positions as they may exist at either elementary or middle schools. Ignoring the narrow scope of facts raised by this case concerning co-curricular positions, the dissent instead sweeps under one giant umbrella, every and all co-curricular positions, in every and all public school districts, and at every level of K-12 education.

Absent any record evidence, the dissent stunningly asserts: (1) that such positions "have a powerful instructional component and constitute a significant part of the school district's educational mission"; (2) that "[s]tudents who participate in extracurricular activities often find that the life skills, teamwork, training, motivation, and discipline that are taught from those activities by instructors, mentors and coaches who occupy those Schedule B positions stay with them well beyond graduation and perhaps for a lifetime," and (3) that Schedule B positions involve "an adult with specialized knowledge and training, who leads a group of students through the principles, techniques, practice, and application of an activity with the intent of developing mastery of those principles."

The only "evidence" cited by the dissent concerning co-curricular positions is 1.5 pages of contract language along with an exhaustive review of the Union's grievance language and the Employer's responses. But none of that supports his wide-ranging assertions. The record is devoid of any testimony, job descriptions, or other evidence concerning the nature of the varsity soccer coach position involved in this case, or any other co-curricular position. While the dissent asserts that "the school district *may* establish qualifications" for such positions, there is no record evidence indicating that any qualifications were established by any school district for such positions, let alone by Garden City, the only employer involved in this case.

There is no record testimony concerning the type or level of instruction provided by individuals in co-curricular assignments. There is no record evidence concerning the impact, if any, on students who participate in co-curricular activities. There is no record evidence substantiating the dissent's assertion that these positions constitute a "significant part of the school

district's mission." There is no record evidence describing the difference between co-curricular positions in elementary, middle school, and high school, despite the fact that the age, mental and physical development, and maturity of students, varies markedly from elementary school to high school. Instead of record evidence, the entirety of the dissent's conclusions are based on opinion, personal views, speculation, and pure conjecture.

The dissent further asserts that the collective bargaining agreement "treats a soccer coach's vacancy as a type of teacher assignment to which teachers are given preference," ignoring the fact that the Employer essentially took the *opposite* position, by maintaining in its April 20, 2018 grievance response that teachers were *not* entitled to preference for such positions because "there has been a past practice when the District has hired external candidates for Schedule B positions, despite internal GCEA members applying for the Schedule B position."

Finally, our dissenting colleague argues that "the assignments involved in the present dispute are thus not positions akin to that of a janitor, cook, or bus driver. To the contrary, they are a type of teaching assignment that has far more in common with a traditional curricular teaching assignment than the speech pathologist position involved in *Pontiac School District."*

This last argument is particularly astonishing because it relies upon the proposition, divined out of thin air, that the legislature intended to allow school districts discretion to place teachers in Schedule B, co-curricular positions because of their alleged "instructional" component, but that such discretion was not meant to extend to what the dissent acknowledges are "non-instructional" positions, like a school janitor or cook. Our dissenting colleague offers no basis whatsoever to support the conclusion that assuming, *arguendo*, the Legislature intended co-curricular or "instructional" positions to be included under the prohibitions of Section 15(3)(j), that it also intended a distinction be made between those positions and other "non-instructional positions.[10] In fact, there is no indication, express or implied, that the Legislature contemplated the inclusion of co-curricular positions under the umbrella of the term "teacher." Likewise, there is no basis upon which to draw so much as an inference that the Legislature intended co-curricular positions be subject to different treatment from other non-instructional positions for purposes of the bargaining prohibitions of Section 15(3)(j).

Like the Employer, our dissenting colleague stridently maintains that because the Legislature began 26 years ago transferring certain power from public school teachers and their unions to the school districts, we should broadly interpret the 2011 amendments to PERA as eradicating any remaining rights of *teachers* and their unions. However, the plain language of Section 15(3)(j) focuses not on "teachers" in general, but rather, on the much narrower issue of "decisions regarding teacher placement." Like the Employer, our dissenting colleague violates

[10] As noted above, we did not decide in *Pontiac* that a speech pathologist was covered by Section 15(3)(j). We decided that an individual, working as a speech pathologist, who the employer repeatedly described as a "certified teacher" was covered by Section 15(3)(j) because the union had waived its right to claim otherwise.

well-established rules of statutory construction under *Speicher, supra,* by the impermissible segregation of the word "teacher" from the phrase "teacher placement." See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 2 (2012) (statutory "purpose is to be described as concretely as possible, not abstractly": "For example, a statute providing a specific protection and a discrete remedy for purchasers of goods can be said to have as its purpose 'protecting the consumer.' That would not justify expansive consumer-friendly interpretations of provisions that are narrowly drawn. Such a highly generalized purpose is not relevant to genuine textual interpretation").

The one point on which we concur with the dissent is that the phrase "teacher placement" is unambiguous. The legislature has defined the term "teacher" only one way: "A certificated individual employed for a full school year by any board of education or controlling board." The plain meaning of the phrase "teacher placement" is clear: The placement of a teacher in a teaching position.

Accordingly, we find that Respondent did not breach its duty to bargain in good faith by arbitrating a grievance over the school district's decision not to fill a Schedule B position with a certificated teacher who applied for that position. The present case does not involve a "teacher placement" decision governed by Section 15(3)(j) because it does not involve the placement of a teacher into a teaching position. Therefore, we affirm the ALJ's decision and adopt the recommended Order to dismiss the charge in its entirety as our final Order.

We have considered all other arguments submitted by the Parties and conclude that they would not change the result in this case.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair

Tinamarie Pappas, Commission Member

Issued: October 22, 2020

Robert S. LaBrant, Commission Member, Dissenting.

The question before the Commission in this case is whether a school district employer must bargain over the placement of a teacher on a Schedule B job assignment? After reviewing the text of Section 15(3)(j) of PERA, viewed in the context of the legislative amendments to PERA in 1994 and 2011, and all the subsequent MERC and Court of Appeals rulings that followed those enactments, I find the answer to be a resounding no!

In the present case, Garden City Public Schools (the Employer) and the Garden City Education Association (the Union) are parties to a collective bargaining agreement which was in effect from September 1, 2015, through August 31, 2018. In accordance with Article I, Section A, Recognition, of the agreement, the bargaining unit represented by the Union consists of all certificated and/or professional personnel employed by the school district including, but not limited to, certified teachers, counselors, psychologists, social workers, coordinators, driver education instructors, librarians, consultants and "all positions listed in Schedule B" of the agreement.

Schedule B of the agreement provides, in relevant part:

> Co-curricular Pay Schedule
> Teachers involved in extra duty assignments will be compensated at the following percentages of the B.A. salary schedule A in existence at the beginning of the school year. Each year of experience in the activity is equal to one step on the schedule to a maximum of Step 4.
>
> High School Athletics
> ***
> Head Coaches
> Soccer 8.75%

Article III, Professional Compensation, of the contract governs compensation for bargaining unit members. Article III, Section I provides:

> Members involved in extra duty assignments, involving additional time beyond the maximum required work week, shall be compensated in accordance with Schedule B which is attached to and incorporated into this Agreement.

Article V, Full Time Member Assignment, provides, in relevant part:

> The Board and Association recognize that proper member placement is in the best interest of the district and its students.
>
> ***

> Section J. An extra-curricular position(s) which the Board plans to fill during the next school year and for which there is added compensation will be posted for five (5) consecutive work days during the month of May, and an e-mail shall be sent to all GCEA members on the first day of the posting. Interested members shall notify the Associate Superintendent, in writing, of their interest on/before June 1st, provided that:
>
> 1. The member(s) currently filling the position has/have indicated that he/she does not wish to continue in the position during the next school year, or
>
> 2. The performance of the member(s) currently filling the position(s) is unsatisfactory, or
>
> 3. Positions currently filled by persons not teaching in the district are not subject to posting but are considered open.
>
> 4. Extra-curricular positions, which become vacant during the school year or during the summer, will be posted on the district website and an email shall be sent to all GCEA members on the first day of the posting. These position(s) are to be filled no sooner than the tenth (10th) business day following the district-wide posting; except that the district may make interim appointments which shall not extend beyond the filing of such positions.

The contract also contains a grievance procedure, Article XIII, which culminates in final and binding arbitration.

On February 14, 2017, the school district assigned an individual outside of the Union's bargaining unit as the high school boys' varsity soccer coach, a Schedule B position. At least one certified teacher had previously applied for the position.

On March 12, 2018, the Union filed a timely grievance challenging the outsourcing of the high school soccer coach position. The grievance asserts that "Andrew Pedley, a teacher in district, applied for the open soccer position, but was told that the position was given to someone outside the district."

Associate Superintendent Brian Sumner answered the grievance by email dated April 11, 2018. In the email, Sumner wrote, "[The] administration maintains that there has been no violation of the GCEA Collective Bargaining Agreement and the grievance is denied. Administration also maintains this matter is a prohibited subject of bargaining, given it relates to teacher placement."

The Union then advanced the grievance to the next level by filing a formal written grievance on April 12, 2018. According to the grievance, "all extra-curricular positions as stipulated in Schedule B are protected rights of GCEA members." The grievance asserted that because a member of the GCEA applied for the position of high school soccer coach, "the position

was no longer open to those outside the district. Any outside postings and interviews are a violation to [sic] the Master Agreement since the GCEA member had rights to this position according to the contract and past practice...Schedule B lists the various opportunities teachers have for extra duty assignments along with its compensation. Additionally, past practice constitutes that teachers have rights to any and all extra-curricular positions." The grievance sought the following as a remedy for the alleged contract violation:

> Schedule B positions, extra-curricular positions and extra duty positions are positions for GCEA members as stipulated by the Master Agreement. The Garden City Board of Education agrees not to outsource jobs, therefore the position of Boys Varsity Soccer Coach will be assigned to the GCEA member who requested it, along with lost wages for the 2018 Soccer season.

By email dated April 20, 2018, Sumner denied the grievance. The administration's response asserted that "there has been a past practice when the District has hired external candidates for Schedule B positions, despite internal GCEA members applying for the Schedule B position." Three instances were cited in the grievance denial in support of the school district's past practice argument. In addition, the administration asserted that "this matter is one of placement and is a prohibited subject of bargaining."

The Union advanced the grievance to the next level on April 24, 2018. On May 8, 2018, Superintendent Derek Fisher issued a memorandum denying the grievance. In the memo, the school district once again asserted that "placement is a prohibited subject of the collective bargaining process and that there has not been a violation of the GCEA Master Agreement."

On May 31, 2018, the Union submitted a demand for arbitration. As a result, the Employer filed the instant charge on June 18, 2018 alleging that the Union had violated PERA by filing a grievance over teacher placement, a prohibited subject of bargaining under Section 15(3)(j) of PERA, and by advancing that grievance to arbitration.

The grievance was heard by Arbitrator Michael J. Falvo on January 22, 2019 and, in an Opinion and Award issued on March 18, 2019, the Arbitrator granted the grievance, concluding that a past practice existed pursuant to which the school district is prohibited from placing an individual who is not a part of the bargaining unit into a Schedule B position when a bargaining unit member has also applied for the position.

On December 3, 2019, the ALJ issued his Decision and Recommended Order, in which he recommended that the charge against the Union be dismissed. The ALJ's opinion erroneously interpreted Section 15 (3)(j) to be ambiguous, despite Court of Appeals precedent to the contrary. The ALJ focused on two words 'teacher placement." The ALJ said those two words do not have any plain or ordinary meaning. Out of twenty-five words in subsection (j), the ALJ made no attempt to give meaning to the other twenty-three words, accord any of those words their plain or

ordinary meaning, or account for the context in which they are used. The ALJ's construction of the statute relies on an impermissible redraft of Section 15(3)(j) to fit the analytic result sought.

In the majority opinion for this case, my colleagues argue that 1) this is a case of first impression for the Commission, 2) there is little ambiguity in the phrase "teacher placement" (contrary to the ALJ) and that the phrase "teacher placement" is the placement of a teacher in a teaching position, 3) a review of the bill analysis prepared regarding the 2011 tie-barred legislation (PA 103) refutes the validity of the Employer's position, and 4) the Employer's argument selectively shifts the focus of the phrase "teacher placement" to the word "teacher" over the word "placement." I believe my colleagues are in error.

The Michigan Court of Appeals in *Ionia Ed Ass'n v Ionia Public Schools*, 311 Mich App 479, 486-487 (2015) disposed of any argument that the terms of Section 15 (3)(j) were somehow ambiguous. In *Ionia*, the collective bargaining agreement required a "bid-bump" meeting with respect to teaching assignments. After the agreement expired, however, the employer-school district did not schedule "bid-bump" meetings despite the union's repeated requests for such meetings. The union then brought an unfair practice charge against the employer. In a decision reported at 27 MPER 55, the Commission dismissed the charge. The Michigan Court of Appeals affirmed. The Court did not find that the phrase "teacher placement" was ambiguous. To the contrary, the Court noted that the term "placement" as used in the statute is commonly understood to refer to "an act or instance of placing" or "the assignment of a person to a suitable place (as a job or a class in school)." The Court also did not find any limitation on the type of assignment and noted that the statute gives broad discretion to public school employers to make any decision unmeasured or unlimited in amount, number or extent, regarding or concerning teacher placement:

> Section 15(3)(j) provides that collective bargaining between a public school employer and a bargaining representative of its employees "shall not include" "[a]ny decision by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or bargaining unit." MCL 423.215(3)(j) (emphasis added). The word "any" is not defined in the statute, but is commonly understood to be all-encompassing, meaning "every" or "all" and can be "used to indicate one selected without restriction" or "to indicate a maximum or whole." Merriam-Webster's Collegiate Dictionary (11th ed.). The word "decision," meanwhile, is defined to mean "the act or process of deciding." Id. The term "placement" as used in the statute is commonly understood to refer "an act or instance of placing" or the assignment of a person to a suitable place (as a job or a class in school). Id.
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> * * *
>
> The plain language of the statute gives broad discretion to public school employers to make "[any decision," i.e., every decision or all decisions, "unmeasured or unlimited in amount, number or extent," regarding or concerning teacher placement. The statute contains no limitations on the employer. Also, the statute refers to decisions, which include the act or process of deciding. By stating that there was no duty to bargain over "[a]ny decision"

> regarding teacher placement and providing no limitation or explanation thereafter, the Legislature demonstrated its intent to afford public school employers broad discretion of teacher placement decision or the impact of that decision on individual teachers or the bargaining unit as a whole.
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> * * *
>
> In other words, the Legislature intended to remove from the ambit of bargaining any decision concerning the assignment or placement of teachers, and that any decision-making about teacher placement or assignments is to be within the sole discretion of the employer. The broad language used in the statute necessarily includes any decision-making process as well; consequently, policies and procedures used to make teacher placement decisions such as those at issue in the instant case undoubtedly fall within the broad reach of "any decision" regarding teacher placement.

Similarly in *Pontiac School District*, 28 MPER 34 (2014), aff'd *Pontiac Sch District v Pontiac Education Ass'n*, unpublished opinion of the Court of Appeals, issued September 15, 2015 (Docket No. 321221), the Commission found that the employer-school district lacked any duty, under Section 15(3)(j), to bargain over the transfer of a speech pathologist. On this basis, the Commission concluded that the union violated its duty to bargain under Section 10(3)(c) by advancing the speech pathologist's grievance to arbitration. In *Pontiac School District*, we noted that the Merriam-Webster dictionary defined "placement" as "an act or instance of placing: as . . . the assignment of a person to a suitable place (as a job or a class in school)." Although the Union asserted in its exceptions that the speech pathologist was not a teacher as defined by Michigan law, we noted that the Teachers' Tenure Act, 1937 PA 4, defines a "teacher" as "a certificated individual employed for a full school year by any board of education or controlling board." Given that the Employer had repeatedly claimed that the speech pathologist was a teacher, regardless of the position to which she was transferred or from which she was transferred, and given that the Union had not disputed this, we found that the Union's position was without merit.

My colleagues attempt to frame this case as one of statutory interpretation. They and the ALJ, however, do not abide by the cardinal rule of statutory construction, where language is unambiguous, no further construction is necessary, *Madugula v Taub*, 496 Mich 685, 696 (2014). The meaning of "teacher placement" was addressed by the Michigan Court of Appeals in the *Ionia* decision, Id. My colleague's reliance on Johnson v School District No. 1, 413 P.3d 711, has little relevance or precedential value beyond Colorado and certainly none here in Michigan and actually addresses facts totally unrelated to the present case.

The ALJ in his proposed decision goes on to construct out of his perceived ambiguity, an alternative reality, where the 1994 and 2011 amendments to PERA really do not count. The ALJ says those amendments are merely "exceptions" to PERA's duty to bargain. The "real" PERA, in the ALJ's eyes, must be the statute first enacted back in 1965.

The majority and the ALJ attempt to frame this case, by defining Schedule B job assignments as non-instructional, which ignores the fact that the duties of Schedule B positions are very much about teaching and instruction. Consider the scope of these Schedule B activities: debate, newspaper, yearbook, stage lighting, vocal music, art, band, cheerleading, all sports the school district offers, the special services home bound teacher and the National Honor Society.

These Schedule B positions have a powerful instructional component and constitute a significant part of the school district's educational mission. Students who participate in extracurricular activities often find that the life skills, teamwork, training, motivation, and discipline that are taught from those activities by instructors, mentors and coaches who occupy those Schedule B positions stay with them well beyond graduation and perhaps for a lifetime.

These Schedule B jobs involve the necessary elements of a teacher: an adult with specialized knowledge and training, who leads a group of students through the principles, techniques, practice, and application of an activity with the intent of developing mastery of those principles.

In making these Schedule B job placements, the school district employer may establish qualifications. A teacher would not be rejected because he or she holds teacher certification. A teacher would be rejected because he or she is not qualified to be placed in a given Schedule B position or is less qualified than other available candidates. While the ALJ expressed outrage that a janitor or a cook might have greater rights to a Schedule B position than a certified teacher, a janitor or cook might well bring greater skills, qualifications, and experience to a Schedule B position than a certified teacher. This precisely was the legislative intent behind the 2011 amendment to PERA.

Furthermore, the collective bargaining agreement treats a soccer coach's vacancy as a type of teacher's assignment to which teachers are given preference. Schedule B, for example, provides for a co-curricular pay schedule (Curricular activities are those activities that are a part of the curriculum. Co-curricular activities are those activities that are outside of but usually complementing the regular curriculum). Under Schedule B, teachers involved in extra duty assignments, such as the soccer coach assignment, are compensated at a certain percentage of the B.A. salary schedule A in existence at the beginning of the school year. There are 67 Schedule B positions (Award of Arbitrator Falvo, p. 30).

Additionally, Article V of the collective bargaining agreement, after noting that proper member placement is in the best interest of the district and its students, provides that extra-curricular positions "currently filled by persons not teaching in the district are not subject to posting but are considered open." Moreover, in the appeal of the grievance involved in this dispute, the Union asserted that "Schedule B lists the various opportunities teachers have for extra duty assignments along with its compensation. Additionally, past practice constitutes that teachers have rights to any and all extra-curricular positions." The assignments involved in the present

dispute are thus not positions akin to that of a janitor, cook or bus driver. To the contrary, they are a type of teaching assignment that has far more in common with a traditional curricular teaching assignment than the speech pathologist position involved in *Pontiac School District*. See also *Pontiac Sch. Dist. v. Pontiac Educ. Ass'n*, 295 Mich. App. 147, 154, (2012) (positions in which individuals impart knowledge or information to students are instructional under Section 15(3)(f)).

> Section 15(3)(j) of PERA states:
> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
> * * *
> (j) 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.

PERA Section 15(3)(j), in plain, unambiguous language provides the school district with broad and unfettered discretion to determine "any" placement of teachers. This is underscored by Section 15(4):

> Except as otherwise provided in Section (3) (f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and for the purposes of this act, are within the sole authority of the public school employer to decide.

The Commission majority also fails to take into account the express admonition in Section 15 (3)(j) that the subsection addresses "any" decision regardless of impact on the "individual employee or the bargaining unit." (emphasis added).

This is critical because the Commission majority has bought into the ALJ's bias that Section 15(3)(j) somehow only applies to teachers and bargaining units when: 1) the teachers are employed in classroom-based, curricular instructional activity, and 2) where a teaching certificate is required. This two-prong test has no statutory basis in PERA. It was just made up by the ALJ. In fact, nowhere in the text of Section 15(3)(j) is coverage limited to positions requiring teacher certification.

The majority and the ALJ place a reliance on the fact that 2011 PA 103, amending the Public Employee Relations Act (PERA) was tie-barred to (2011 PA 100 and 2011 PA 101), amending the Teacher Tenure Act (TTA); and (2011 PA 102), amending the Revised School Code (RSC).

Both my colleagues and the ALJ place great weight on each bill analysis written by a legislative staffer for this legislative package. Bill analyses especially are generally unpersuasive and should be "entitled to little judicial consideration." *Frank W. Lynch & Co. v Flex Techs, Inc*, 463 Mich 578, 624 N.W.2d 180 (2001). However, Michigan is not one of the states where

legislative history, in contrast to the text of the statute, has much sway. *Pohutski v City of Allen Park*, 465 Mich 675, 641 N.W. 2d 219 (2002). The ALJ claims that all four tie-barred Public Acts must be read in pari materia, the ALJ claims this ensures classroom teaching positions are filed by qualified employees and gives the public employer unfettered authority to remove classroom teachers from positions for which they are not qualified. That said, should not the ALJ's analysis equally apply to Schedule B job assignments that allows school employers to hire qualified applicants and remove those who are not qualified?

A tie-bar is not some silver bullet impacting this case, the term simply refers to "the practice of placing a provision in a bill which states it will not become effective until another specified bill is also enacted into law, thus a statute which contains a tie-barred provision does not become operative until the happening of a contingency, the enactment of another statute." OAG, 1979-1978, No. 5478, p.128 (April 4, 1979). In other words, a tie-bar is a legislative practice that comes close to crossing the line on the constitutional prohibition on log rolling found in Article 4, Section 24 where each bill tie-barred to others might not succeed on its own merit. A tie-bar may in fact just be used to cobble together the 20 votes in the state Senate and the 56 votes in the state House required to pass a bill.

My colleagues and the ALJ said that this is a case of first impression with respect to the statutory construction of Section 15 (3)(j) of PERA. Said another way, nine years have passed since 2011 PA 103 was enacted. There are 587 school districts in Michigan. The Garden City School District has 67 Schedule B employees. The Garden City School District ranks 171 in size of the 587 school districts in the state (according to the Michigan High School Athletic Association). Assume Schedule B job assignments in Garden City are near average. That would mean 587 school districts X 67 Schedule B employees = 39,329 Schedule B assignments made annually across the state. School district employers across the state have made 39,329 X 9 years= 353,960 Schedule B job assignments over the past nine years apart from this legal challenge regarding a soccer coach. To remove any inflated assumptions I have made, take these calculations, cut them by one-third or even one-half. The fact remains, since 2011, 100's of thousands of Schedule B job assignments has been made by school district employers across the state. Yet this is a case of first impression. Why?

Unions know that attempting to negotiate a contract over a prohibited subject of collective bargaining subjects them to an unfair labor practice charge; even if a contract containing a prohibited subject were to be reached, it would be rendered illegal and unenforceable. *Calhoun Intermediate Education Association*, 28 MPER 26 (2014); *Pontiac Sch Dist*, 28 MERC Lab Op 34 (2014); *Shiawassee ISD*, 30 MERC Lab Op 13 (2017).

Unlike the Commission majority in this case, I believe that when the Garden City Education Association's discussions with the school district employer concerning a prohibited subject of collective bargaining went beyond the talking stage and an arbitration was sought, the union committed an unfair labor practice under Section 10(2)(d) of PERA. *Pontiac Sch Dist*, 28

MPER 34 (2014); *Ionia Co Intermediate Rd Assn*, 30 MPER Lab Op 18 (2016); and *Shiawassee ISD*, 30 MERC Lab Op 13 (2017).

The Commission majority affirms the ALJ's attempts to gloss over the history of the PERA amendments that first were enacted in 1994 and again in 2011. There is no escaping the fact, that the legislature 26 years ago began to transfer power and bargaining leverage from teacher unions to public school employers. The Court of Appeals in two landmark decisions, and MERC in numerous cases have upheld that transfer.

Prohibited subjects of collective bargaining were first introduced into PERA in 1994 by way of listing specific prohibited subjects of bargaining. This is a distinction from the general duty to bargain over mandatory subjects. Prior to 2011, placement of teachers was not among the prohibited subjects under PERA, but that changed in 2011 when the Legislature added teacher placement as a prohibited subject of collective bargaining.

2011 PA 103, added several prohibited subjects to Section 15 (3) of PERA, including that set forth in Section 15 (3)(j). The legislature's intent in enacting the 2011 amendments was to ensure that public school districts had the right to make personnel decisions free from constraints by unions and administrative agencies and return control of decision-making responsibility to school boards.

The Michigan Court of Appeals in *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995); aff'd 453 Mich 362 (1996) concluded that the Legislature, in enacting the 1994 amendments to PERA in 1994 PA 112, intended "to foreclose the possibility that these areas could ever again be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing bargain over them or that they could ever be a part of a collective bargaining agreement."

In *Ionia Pub Sch*, 27 MPER 55 (2014), MERC found the same legislative intent present in the additions to Section 15(3) made by 2011 PA 103:

> After the enactment of 2011 PA 103, provisions of the parties expired collective bargaining agreement that applied to teacher placement procedures for filing vacant teaching position, and procedures relating to the layoff and recall of teachers are indisputably no longer mandatory subjects of bargaining. In fact, those provisions are prohibited subjects of bargaining. Pontiac Sch Dist, 28 MPER 1 (2014); Pontiac Sch Dist, 27 MPER 60 (2014); Ionia Pub Sch, 27 MPER 55 (2014); Pontiac Sch Dist, 27 MPER (2014). Therefore, the Employer is no longer required to comply with those terms of the expired contract and may not lawfully bargain over them.

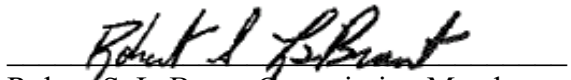
Similarly, in *Pontiac School District*, 28 MPER 34 (2014), aff'd *Pontiac Sch District v Pontiac Education Ass'n*, unpublished opinion of the Court of Appeals, issued September 15. 2015 (Docket

No. 321221), the Commission found that the employer school district lacked any duty, under Section 15 (3)(j), to bargain over the transfer of a speech pathologist. On this basis, the Commission concluded that the union violated its duty to bargain under Section under Section 10(3)(c) by advancing the speech pathologist's grievance to arbitration.

In this case, the Union filed a grievance alleging that the collective bargaining agreement was violated when the Employer failed to assign a certified school teacher, Andrew Pedley, to a Schedule B soccer coach's vacancy. As in *Pontiac School District*, the employer-school district lacked any duty, under Section 15(3)(j), to bargain over this matter and the union violated its duty to bargain under Section 10(3)(c) when it advanced the teacher's grievance to arbitration. It is clear, the ALJ's proposed opinion and order should have been reversed by MERC.

PERA has not been amended. Court of Appeals precedent remains unchanged. The Garden City Education Association's remedy is not here at MERC, despite my colleague's best effort in this quasi-judicial setting to administratively rewrite Section 15 (3)(j). The union's remedy is to go to the Legislature and lobby for a change in the statute. That was how PERA was changed, the old-fashioned way, by the efforts of school districts and school administrators across the state in 1994 and 2011 to influence the Legislature.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Robert S. LaBrant, Commission Member

Issued: October 22, 2020

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

In the Matter of:

GARDEN CITY EDUCATION ASSOCIATION, MEA/NEA,
Respondent-Labor Organization,

Case No. CU18 F-020
-and- Docket No. 18-012974-MERC

GARDEN CITY PUBLIC SCHOOLS,
Charging Party-Public Employer.
_____/

APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue, for the Labor Organization

Miller Canfield Paddock & Stone, PLC, by John H. Willems, for the Public Employer

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by Garden City Public Schools against the Garden City Education Association, MEA/NEA. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), formerly the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the stipulation of facts and the exhibits agreed upon by the parties, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural Background:

This matter concerns a decision by Garden City Public Schools (Charging Party or the school district) to fill the position of high school boys' varsity soccer coach with an individual outside the bargaining unit, rather than awarding the job to a teacher who had submitted an application for the position. The Garden City Education Association (Respondent or the Union) filed a grievance challenging the school district's decision and subsequently advanced that grievance to arbitration. The school district filed this charge on June 18, 2018, asserting that the Union's conduct in pursuing the grievance to arbitration constituted a violation of Section 10(2)(d) of PERA because it concerned a matter of "teacher placement" and, therefore, constituted a prohibited subject of bargaining under the Act.

Upon receipt of the charge, I issued a Complaint and Notice of Hearing scheduling an evidentiary hearing for July 19, 2018. The hearing was later rescheduled for August 14, 2018, at the request of the school district. On or about August 1, 2018, the parties jointly requested that the hearing be adjourned without date and that this matter be decided based upon stipulated facts. The parties submitted a stipulation of facts and several agreed upon exhibits on November 6, 2018. On November 30, 2018, the school district and the Union each filed motions for summary disposition, with the Union requesting oral argument on its motion. Response briefs were filed by the parties on December 28, 2018. Thereafter, I issued an order scheduling this matter for oral argument on March 12, 2019. The parties subsequently agreed to waive oral argument and instead filed supplemental briefs on or before May 3, 2019. Both parties filed timely supplemental briefs and this case was then placed on my decisional docket.

Findings of Fact:

I. Background

Garden City Public Schools and the Garden City Education Association are parties to a collective bargaining agreement which was in effect from September 1, 2015, through August 31, 2018. Pursuant to the recognition clause of the agreement, Article I, the bargaining unit represented by Respondent consists of all certificated and/or professional personnel employed by the school district including, but not limited to, certified teachers, counselors, psychologists, social workers, coordinators, driver education instructors, librarians, consultants and "all positions listed in Schedule B" of the agreement. As described in more detail below, Schedule B positions are extracurricular or "co-curricular" in nature.

Article III of the contract governs compensation for bargaining unit members. Article III, Section I provides, "Members involved in extra duty assignments, involving additional time beyond the maximum required work week, shall be compensated in accordance with Schedule B which is attached to and incorporated into this Agreement." Schedule B sets forth the pay scale governing various extra duty assignments for which bargaining unit members may apply. These positions, which are referred to in the contract as "co-curricular" positions, include athletic director, head coach, assistant coach, cheerleading, newspaper, art, vocal music, stage lighting and National Honor Society. There is no requirement, contractual or otherwise, that a Schedule B coaching position be filled by a certified teacher.

Article V, Section J of the agreement sets forth the procedure by which extra-curricular positions are to be assigned. That section provides:

> An extra-curricular position(s) which the Board plans to fill during the next school year and for which there is added compensation will be posted for five (5) consecutive work days during the month of May, and an e-mail shall be sent to all GCEA members on the first day of the posting. Interested members shall notify the Associate Superintendent, in writing, of their interest on/before June 1st, provided that:

1. The member(s) currently filling the position has/have indicated that he/she does not wish to continue in the position during the next school year, or

2. The performance of the member(s) currently filling the position(s) is unsatisfactory, or

3. Positions currently filled by persons not teaching in the district are not subject to posting but are considered open.

4. Extra-curricular positions, which become vacant during the school year or during the summer, will be posted on the district website and an email shall be sent to all GCEA members on the first day of the posting. These position(s) are to be filled no sooner than the tenth (10th) business day following the district-wide posting; except that the district may make interim appointments which shall not extend beyond the filing of such positions.

The contract contains a three-step grievance procedure, Article XIII, which culminates in final and binding arbitration. The first step, or "level" as set forth in the contract, requires the Union or a member to discuss the issue with his or her immediate supervisor or principal who will then render a verbal decision within 16 days. If the aggrieved member or the Union is not satisfied with that decision, they may file a written grievance specifying the facts underlying the dispute. Pursuant to the contract, grievances processed to the next level are subject to consideration by the Professional Rights and Responsibilities Committee and then may be processed to the superintendent, who must render a written decision within 10 days. If the grievance is not resolved at Level Two, it may be submitted to the arbitrator.

II. Assignment of Boys' Varsity Soccer Coach

On February 14, 2017, the school district assigned an individual outside of Respondent's bargaining unit as the high school boys' varsity soccer coach, a Schedule B position. At least one certified teacher had previously applied for the position. On March 12, 2018, the Union filed a timely grievance challenging the outsourcing of the high school soccer coach position. Associate Superintendent Brian Sumner answered the grievance by email dated April 11, 2018. In the email, Sumner wrote, "[The] administration maintains that there has been no violation of the GCEA Collective Bargaining Agreement and the grievance is denied. Administration also maintains this matter is a prohibited subject of bargaining, given it relates to teacher placement."

The Union advanced the grievance to the next level by filing a formal written grievance on April 12, 2018. According to the grievance, "all extra-curricular positions as stipulated in Schedule B are protected rights of GCEA members." The grievance asserted that because a member of the GCEA applied for the position of high school soccer coach, "the position was no longer open to those outside the district. Any outside postings and interviews are a violation to [sic] the Master Agreement since the GCEA member had rights to this position according to the contract and past practice." The grievance sought the following as a remedy for the alleged contract violation:

> Schedule B positions, extra-curricular positions and extra duty positions are positions for GCEA members as stipulated by the Master Agreement. The Garden City Board of Education agrees not to outsource jobs, therefore the position of Boys Varsity Soccer Coach will be assigned to the GCEA member who requested it, along with lost wages for the 2018 Soccer season.

By email dated April 20, 2018, Sumner denied the grievance at Level 1C. The administration's response asserted that "there has been a past practice when the District has hired external candidates for Schedule B positions, despite internal GCEA members applying for the Schedule B position." Three instances are cited in the response in support of the school district's past practice argument. In addition, the administration asserted that "this matter is one of placement and is a prohibited subject of bargaining."

The Union advanced the grievance to the next level on April 24, 2018. On May 8, 2018, Superintendent Derek Fisher issued a memorandum denying the grievance. In the memo, the school district once again asserted that "placement is a prohibited subject of the collective bargaining process and that there has not been a violation of the GCEA Master Agreement." On May 31, 2019, the Union submitted a demand for arbitration. Shortly thereafter, the school district filed the instant charge alleging that the Union had violated PERA by filing a grievance over teacher placement, a prohibited subject of bargaining under Section 15(3)(j) of PERA, and by advancing that grievance to arbitration.

The matter was heard before arbitrator Michael J. Falvo on January 22, 2019. For purposes of the arbitration, the parties entered into the following stipulation:

1. The parties recognize that the issue of whether a grievance or arbitration regarding placement of a certified teacher to a Schedule B position under the Collective Bargaining Agreement involves a prohibited subject of bargaining under Section 15(3)(j) of PERA is currently before the Michigan Employment Relations Commission in Case No. CU18 F020 ("MERC Proceeding"). Because the bargaining unit consists of both teacher and non-teacher members, and an award on the dispute to be arbitrated would cover both categories of members, the Parties agree to proceed with Arbitration under the terms set forth below. Neither party hereby waives any substantive or procedural arguments, positions or rights with respect to the MERC proceeding. The parties further agree that the issue of whether the award covers Bargaining Unit members who are certified teachers subject to the Teacher Tenure Act but are employed in non-teaching positions is deferred pending the outcome of the MERC proceeding.

2. The Grievance will be tried solely as a class action grievance. No individual remedy will be sought or awarded.

3. The parties are not precluded from submitting evidence at the hearing regarding the historical or current placement or non-placement of teachers to Schedule B positions.

4. In the event the Arbitrator enters an award granting the grievance, it will provide that it applies immediately only to non-teaching members of the bargaining unit and will not have effect as to teacher members of the bargaining unit until a final decision from MERC is issued. In this case, if the MERC decision is in favor of the Association, the award would then apply prospectively to all bargaining unit members. If the MERC decision in favor of the Association is appealed and reversed, the effect of the Award as to teaching members will be void and the award will apply prospectively only to non-teacher bargaining unit members.

5. In the event the Arbitrator has granted the Grievance and the MERC decision is in favor of the District, the award will continue to apply only to non-teacher bargaining unit members. If the MERC decision in favor of the district is appealed or reversed, the award would at that time apply prospectively to all bargaining unit members.

6. Regardless of the outcome at Arbitration, both parties reserve all rights to seek complete or partial vacatur of the Arbitration award in the appropriate court of jurisdiction.

In an Opinion and Award issued on March 18, 2019, arbitrator Falvo granted the Union's grievance, concluding that a past practice exists pursuant to which the school district is prohibited from placing an individual who is not a part of the bargaining unit into a Schedule B position when a bargaining unit member has also applied for the position. In so holding, the arbitrator rejected Respondent's contention that the established practice had been ended, either by a different mutually acknowledged past practice or through modifications to the collective bargaining agreement. Pursuant to the parties' stipulation, the arbitrator did not award any individual relief.

Discussion and Conclusions of Law:

Charging Party argues that the Union violated Section 10(2)(d) of PERA by pursuing and arbitrating a grievance challenging the school district's decision not to fill a Schedule B position with a certificated teacher and member of the bargaining unit who applied for that position. According to the district, the subject matter of the grievance pertains to teacher placement, a prohibited subject of bargaining under Section 15(3)(j) of PERA. Charging Party contends that Section 15(3)(j) applies to any placement decision involving a certificated teacher, even if the position in question is a non-instructional, extracurricular position.

Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. The scope of bargainable issues was significantly narrowed by the Legislature in 1994 with the passage of Public Act 112 (PA 112), which made certain decisions by a public school employer prohibited subjects of bargaining, 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). Thus, PA 112 essentially created an exception to the general rule requiring a public employer to bargain over terms and conditions of employment. Because grievance arbitration is an extension of the collective bargaining process, a labor organization representing public school employees violates 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).

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 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." Since the enactment of PA 103, 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).

For example, 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).

Unlike the cases cited above, the instant dispute does not require this tribunal to determine whether a particular staffing decision by a public school employer constitutes a "placement" or assignment decision for purposes of Section 15(3)(j). Rather, the issue here is whether the prohibition on bargaining applies where the job assignment in question is a non-instructional position for which teacher certification is not required. The Commission has not yet been called upon to address this question directly. The issue was raised, but not explicitly addressed, in *Pontiac Sch Dist*, 28 MPER 34 (2014) aff'd sub nom *Pontiac Sch District v Pontiac Education Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 322184). In that case, the Union argued for the first time on exception that a speech pathologist was not a "teacher" for purposes of Section 15(3)(j) and, therefore, the prohibition on bargaining did not apply to the public school employer's decision to lay off a high school speech pathologist and place her in a position at an elementary school. The Commission held that the union had failed to preserve the issue by raising it before the ALJ. Accordingly, the instant case presents an issue of first impression, the resolution of which is dependent on the meaning of the phrase "teacher placement' as used in Section 15(3)(j) of PERA.[1]

Charging Party contends that under Section 15(3)(j), any placement decision involving a certified teacher is a prohibited subject of bargaining regardless of whether the assignment or job in question is instructional. In considering this argument, the primary goal must be, as it is in all matters of statutory construction, to ascertain and effectuate the intent of the Legislature. *Lakeview Community Sch*, 25 MPER 37 (2011), aff'd 302 Mich App 600 (2013); *Casco Twp v Secretary of State*, 472 Mich 566, 571 (2005); *Tryc v Michigan Veterans' Facility*, 451 Mich 129 (1996). The starting point is to review the statute's wording, which provides the most reliable evidence of the Act's intent. *Neal v Wilkes*, 470 Mich 661, 665 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). We must presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory. *Helder v North Pointe Ins Co*, 234 Mich App 500, 504 (1999). Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *Western Mich Univ Bd of Control v State*, 455 Mich 531, 538-539 (1997); *Bingham v American Screw Products Co*, 398 Mich 546, 563 (1976). When statutory language is unambiguous, we must presume that the Legislature "intended the meaning clearly

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[1] This issue was recently addressed directly by the undersigned in *Marquette Ed Ass'n*, Case Nos. CU17 K-033 & C17 J-081; Docket Nos. 17-0225197-MERC & 17-022220-MERC, issued April 22, 2019. The dispute in *Marquette* involves the school district's decision to no longer appoint bargaining unit members to the position of departmental chairperson, an additional duty explicitly set forth in the contract for which teachers were paid a stipend. The union filed a grievance challenging that decision and processed the matter to arbitration, Thereafter, the school district filed an unfair labor practice charge alleging that the union's action violated PERA because the decision concerned various prohibited subjects of bargaining under Section 15(3) of the Act, including teacher placement. In an interim order, I found that the arguments set forth by the district constituted a strained attempt to expand the definition of prohibited subjects far beyond the language of the 2011 amendments. A counter charge filed by the union in *Marquette* remains pending at this time.

expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hosp*, 461 Mich 394 (2000).

The phrase "teacher placement" is not defined within Section 15(3)(j) of the Act or clarified elsewhere within the statute. That specific phrase does not have any plain or ordinary meaning and is not a term of art for purposes of labor relations law. Charging Party contends that the wording of Section 15(3)(j) is unambiguous such that any examination of legislative intent would be inappropriate. According to the school district, the phrase "teacher placement" means any placement or assignment decision which involves or implicates a certified teacher. In making this argument, Charging Party relies on my Decision and Recommended Order in *Marion Ed Ass'n*, ___ MPER ___ (2019). That case involved Section 15(3)(m) of the Act, which prohibits bargaining over disciplinary decisions for public employees whose employment is regulated by the TTA. In *Marion*, the employer filed a charge alleging that the union violated PERA by seeking to arbitrate the school district's decision not to renew the coach of the boys' varsity track team. The employer argued that Section 15(3)(m) applies to all certified teachers employed by a school district, regardless of whether the disciplinary decision relates to their employment as a teacher. In addressing that argument, I contrasted the phrase "public employees whose employment is regulated by the [TTA]" to the language used by the Legislature in other provisions of Section 15, including Section 15(3)(j):

> Many of the subsections of MCL 423.215 do not delineate between the types of public school employees to whom the prohibition on bargaining applies. For example, Section 15(3)(a) of the Act prohibits bargaining over "[w]ho is or will be the policyholder of an employee group insurance benefit," while Section 15(3)(g) prohibits bargaining regarding the use of volunteers in providing "services" at schools. Other provisions contain language specifically limiting the scope of the prohibition to individuals employed in certain positions or types of jobs. For example, Section 15(3)(f) of PERA prohibits bargaining over the subcontracting of "noninstructional support services" whereas Section 15(3)(j) applies only to decisions made by a public school employer regarding "teacher placement," thus excluding all non-instructional employees from the scope of the provision. Likewise, the Legislature limited the reach of Section 15(3)(m) to a narrow class of employees. Section 15(3)(m) has two operative sentences, both of which are prefaced by language limiting the applicability of the prohibition on bargaining to "public employees whose employment is regulated by [the TTA.]" Notably, the Legislature did not simply use the word "teacher" as it did in Subsection 15(3)(j), nor did it specify that the prohibition on bargaining over discipline applied to all certificated public school employees, regardless of the specific duties and responsibilities to which they have been assigned, which it presumably would have done had it intended for the result advocated by the school district in this matter.

Based upon the specific wording of Section 15(3)(m), I held that in order to determine whether a labor organization is prohibited from bargaining a decision pertaining to discipline, the focus must be on whether the discipline impacts an individual in connection with his or her employment in a position regulated by the TTA. In considering that issue, I

noted that the employee in question, Timothy Michell, was working for the school district in two separate capacities. At the time of the incident giving rise to the charge, Michell was a tenured, certificated teacher who had taught math for the district for many years and whose employment was governed by the contract between the public school employer and the teachers' union. At the same time, however, Michell also worked as the boys' varsity track coach, an extra-duty, Schedule B position for which a teaching certificate was not required. I concluded that it was Michell's employment as coach which must be considered in determining whether he was a public employee "whose employment is regulated by [the TTA]." After examining various decisions of the State Tenure Commission (STC), I found that the STC lacks jurisdiction over a teacher's extracurricular assignment and, for that reason, determined that Michell's employment as boys' varsity track coach was not an activity regulated by the TTA for purposes of Section 15(3)(m) of the Act. Accordingly, I held that the union did not violate Section 10(2)(d) by attempting to arbitrate his discharge. The Commission affirmed my decision on exception.

In the instant case, Charging Party relies on my discussion of the various provisions of Sections 15(3) in the *Marion* Decision and Recommended Order, specifically my finding that the Legislature elected to use the specific somewhat unusual phrase "public employees whose employment is regulated by [the TTA]" in Section 15(3)(m), rather than simply use the word "teacher" as it did in Section 15(3)(j). Charging Party asserts that this finding constitutes an acknowledgment that unlike the prohibition on bargaining discipline, Section 15(3)(j) applies to any placement decision regarding a teacher. While there can be no dispute that the language of Section 15(3)(j) is broader than other parts of Section 15, that fact does not mandate a finding in favor of the school district in this matter, as the phrase "teacher placement" is susceptible of more than one meaning.

As noted, the Employer contends that "teacher placement" encompasses any decision involving the placement, assignment or "movement" of a teacher and, therefore, it was a violation of PERA for Respondent to attempt to arbitrate a grievance challenging its decision to fill the boys' varsity soccer coach position with an individual outside of the bargaining unit. Essentially, the school district's argument is that the phrase "teacher placement" means any decision impacting the placement *of a teacher*. While that is certainly a plausible reading of the statutory language, Respondent presents an equally plausible interpretation of Section 15(3)(j). As the Union points out, if the words "teacher" and "placement" are read together, the prohibition on bargaining set forth in Section 15(3)(j) only applies to decisions implicating the placement of an individual in a teaching position; i.e. the phrase "teacher placement" means any decision impacting placement *as a teacher*. Under this interpretation, the grievance which the Union filed in this matter necessarily did not implicate "teacher placement" since the coaching job is an extracurricular Schedule B position rather than a teaching position. Given that the Legislature did not define the phrase "teacher placement" and because reasonable minds could differ with respect to its meaning, this tribunal must look beyond the wording of Section 15(3)(j) to determine whether the Union violated PERA by pursuing a grievance over the school district's decision to outsource the coaching position. *Fluor Enterprises Inc v Dep't of Treasury*, 477 Mich 170, 1787 n 3 (2007), citing *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166 (2004).

To resolve a perceived ambiguity in the language of a statute, it is necessary to examine the object of the statute, the evil or mischief which it is designed to remedy, and to

apply a reasonable construction which best accomplishes the statute's purpose. *Bennetts v State Employees Retirement Bd*, 95 Mich App 616 (1980), *Stover v Retirement Bd of St Clair Shores*, 78 Mich App 409 (1977). Ambiguous statutes are to be interpreted as a whole and construed as to give effect to each provision and to produce a harmonious and consistent result. *In re Petition of State Highway Comm*, 383 Mich 709 (1970); *People v Miller*, 78 Mich App 336 (1977).

PA 103 was part of a tie-barred package of legislation passed in 2011 which significantly impacted the terms and conditions of employment for public school employees. In addition to PA 103, the Legislature enacted Public Acts 100 and 101 of 2011, which amended several sections of the TTA. Among the various amendments was the introduction of language allowing a teacher on continuing tenure to be discharged or demoted for a reason that is not arbitrary and capricious, rather than for reasonable or just cause. MCL 38.101. 2011 PA 102 amended the Revised School Code (RSC), MCL 380.1 et seq, which is a separate and distinct body of law governing "the regulation of school teachers and certain other school employees." See *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 526 (2015). The 2011 changes to the RSC included a requirement that all Michigan school districts adopt a "performance evaluation system" that assesses teacher effectiveness and the introduction of provisions allowing for the dismissal of teachers who have been rated ineffective. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *Baumgartner* at 526, quoting *People v Harper*, 479 Mich 599, 621 (2007). The object of the *in pari materia* rule is to give effect to the legislative purpose as found in harmonious statutes." *People v Webb*, 458 Mich 265 (1998). No one provision may be viewed in a vacuum. See *Jansson v Dep't of Corrections*, 147 Mich App 774, 777 (1985). Reading the 2011 legislation as a whole, it is apparent that the purpose of the tie-barred acts was to ensure that classroom teaching positions were filled by qualified employees and to give the public school employer unfettered authority to remove teachers from instructional positions for which they are not qualified.

This interpretation is supported by the bill analysis prepared concerning the 2011 legislation. Although reliance on bill analyses to determine legislative intent is generally disfavored, *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 (2001); *Detroit Edison Co v Celadon Trucking Co*, 248 Mich App 118, 124 n 15 (2001), the courts have recognized that legislative bill analyses may be of probative value in some circumstances "as casting light on the reasons the Legislature may have had and the meaning they intended for the act." *City of Fraser v Almeda Univ*, 314 Mich App 79, 97 (2016), quoting *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 81 (2014). See also *Kelly Services Inc v Treasury Dept*, 296 Mich App 306 (2012); *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170 (2007); *Seaton v Wayne Co Prosecutor (On Second Remand)*, 233 Mich App 313, 321, n 3 (1998). According to the analysis of the 2011 legislation, the purpose of the four tie-barred bills enacted in 2011 was "to ensure that ineffective teachers improve their practice or be removed from the teaching profession in a more timely manner." House Legislative Analysis, HB 4625, 4626, 4627 & 4628, September 27, 2011. Elsewhere, the analysis describes the purpose of the legislation as setting "new standards with the aim of ensuring more effective teaching." The analysis explains that the arguments in favor of the bills included that the legislation "helps to assure that more of Michigan's K-12 students will have effective teachers who prepare

and guide them to productive post-secondary work and higher education" and introduces a new teacher evaluation system based on "classroom observations."

In an apparent attempt to downplay the impact of the bill analysis, Charging Party argues that its decision to outsource the coaching position in this matter was the type of action contemplated by the Legislature because Schedule B positions have an instructional component. According to the school district, extracurricular assignments "involve the necessary elements of a 'teaching' activity: an adult with specialized knowledge and training leads a group of students through a study of principles and techniques – and their practice and application – with the intent of developing mastery of those principles and real-life situations." This argument is, of course, belied by Charging Party's concession that a teaching certificate is not required for any Schedule B position. That fact also demonstrates the absurdity of the interpretation proffered by the school district in this matter. Under Charging Party's reading of the statute, the school district has unfettered authority to disregard its contractual obligations and deny a Schedule B position to a member of the bargaining unit merely because that individual holds a teaching certificate, but at the same time the district is required to bargain over the assignment of a janitor, cook, librarian or other non-certificated employee to an extra-curricular position. Such a result would not serve any imaginable legislative purpose. Equally disingenuous is the school district's assertion that the "overall scope of the amendments" extended beyond matters relating to the employment of teachers. None of the statutory provisions cited by Charging Party in support of this contention were part of the tie-barred package of legislation enacted in 2011.

Because the phrase "teacher placement" is ambiguous, and based upon an examination of the tie-barred package of legislation passed in 2011, as well as the legislative history, I conclude that Section 15(3)(j) was intended only to prohibit a labor organization from insisting on bargaining decisions implicating the placement of an individual in a classroom teaching position. I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result.

In summary, I find that Respondent did not breach its duty to bargain in good faith by attempting to arbitrate a grievance over the school district's decision not to fill a Schedule B position with a certificated teacher who applied for that position. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by Garden City Public Schools against Garden City Education Association, MEA/NEA in Case No. CU18 F-020; Docket No. 18-012974-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: December 3, 2019