STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND HAVEN PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C02 L-273

- and -

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

APPEARANCES:

Scholten Fant, P.C., by John S. Lepard, Esq. and Bradford W. Springer, Esq. for Respondent

Kalniz, Iorio & Feldstein Co., LPA, by Fillipe S. Iorio, Esq. and Krista B. Durchik, Esq. for Charging Party

DECISION AND ORDER

On September 30, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter, recommending dismissal of the unfair labor practice charge of Charging Party Grand Haven Education Association. The ALJ found that Respondent Grand Haven Public Schools did not commit an unfair labor practice in violation of Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by refusing to bargain over implementation of a web page program.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On November 22, 2005, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. Respondent filed an untimely response to Charging Party's exceptions on January 5, 2006.[1]

The Grand Haven Education Association filed this charge against the Grand Haven Public Schools, alleging that Respondent violated its duty to bargain under Section 10(1)(e) of PERA.

[1]Respondent's response to the exceptions was mailed to the Commission offices via priority overnight mail on January 3, 2006 and, therefore, should have been received in our offices on January 4, 2006, the day they were due. For an unexplained reason, the priority package did not arrive in our offices until January 5, 2006. Though we might have considered this good cause for a late filing under Commission Rule 176(8), we have not found it necessary to consider the response in reaching our decision in this case.

Charging Party represents a bargaining unit of professional employees including certified teachers employed by Respondent. The charge alleges that in August, 2002, Respondent unilaterally altered the terms and conditions of employment by directing and/or encouraging its high school teachers to create individual web pages to be posted on the School District's web site and, thereafter, refused to bargain with the Union over the web page program on the grounds that it was a prohibited subject of bargaining.

In its exceptions, Charging Party contends that the ALJ misinterpreted Sections 15(3)(h) and 15(4) of PERA in finding that the web page program was an "educational program or service" and, therefore, a prohibited subject of bargaining. Charging Party alleges that the ALJ's statutory interpretation is an "impermissible expansion of a clear and unambiguous statute." Instead, Charging Party asserts that the web page program is a mandatory subject of bargaining as it affects wages, hours, and other terms and conditions of employment.

Factual Summary:

In the summer of 2002, Respondent took action to expand the use of its existing web site, which had been used to communicate information regarding the District and its schools to the public for various educational and public relations reasons. In order to accomplish its goal of better student, parent, and community involvement, Respondent encouraged its individual teachers to create web pages and scheduled training on their design and creation.

The teachers had a variety of concerns about the web pages, which included whether or not a teacher's ability to create and maintain a web page would be part of his or her written evaluation, and whether the inability to do so may lead to discipline. In light of these concerns, only some of the teachers completed web pages during a scheduled training session. In September 2002, Charging Party's president spoke to Respondent's assistant superintendent for human services and inquired whether creating a web page was mandatory; he was informed it was not. Thereafter, Respondent's assistant superintendent sent an email to all high school staff indicating that no deadline existed for creation of the web pages. He further advised staff that the creation of a web page was not a mandate, and that if individual staff members chose not to move forward, they needed only to inform the district's information technology staff member assigned to the project..

Respondent told Charging Party that it would meet to discuss the teachers' concerns about the program, but that it would not bargain concerning them, noting that it regarded the program as a prohibited subject of bargaining. Charging Party drafted a letter of agreement regarding the web page program, which it presented to District officials; however, Respondent refused to enter into such an agreement. Charging Party then suggested to its members that they refrain from participating in the web page program. At the time of the hearing, Respondent had not ordered any teacher to create a web page; nor had any bargaining unit member been evaluated or disciplined based on his or her web page or lack thereof.

Discussion and Conclusions of Law:

Section 15(3)(h) of PERA states that there are certain subjects of bargaining that are prohibited between public school employers and unions and as such, these subjects are within the sole authority of the employer to decide. Such subjects include "decisions concerning the use of technology to deliver educational programs and services and staffing to provide the technology or the impact of these decisions on individual employees or the bargaining unit."

The Michigan Court of Appeals upheld the constitutionality of the Section 15 amendments in *Michigan State AFL-CIO v Michigan Employment Relations Comm*, 212 Mich App 472, (1995), aff'd 453 Mich. 362 (1996). Charging Party alleges that Section 15 limitations do not apply to the web page program because it is not an "educational program or service" and Respondent, therefore, was required to bargain over its implementation. Charging Party seeks a construction of Section 15 to include only those programs and services that constitute actual instruction. While there is limited if any precedent on such issue, we agree with the ALJ that the plain language of the statute supports the ALJ's finding that the contested phrase is not limited solely to the use of technology when instructing students and does apply to Respondent's web page program.

We also hold that Respondent is not required to bargain over the web page program or enter into a written agreement on this subject, because participation in the program was voluntary. Creation of the web page program does not constitute a mandatory subject of bargaining as Respondent did not alter the wages, hours, or terms or conditions of employment of members of Charging Party's bargaining unit through the implementation or attempted implementation of this voluntary program. Nothing in the record indicates that Respondent changed its criteria for evaluating employees based on participation in the web page program. As a result, Respondent did not commit an unfair labor practice by refusing to bargain over its implementation. The web page program is a prohibited subject of bargaining and is left to the discretion of the Respondent – a public school employer – to decide. We, therefore, adopt the ALJ's recommended order.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated:_____

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Lansing Michigan on March 5, 2004 and February 28, 2005, by Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission.2 Based upon the entire record, including post-hearing briefs filed by the parties on or before April 19, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Grand Haven Education Association, MEA/NEA, filed this charge against the Grand Haven Area Public Schools on December 23, 2002, alleging that Respondent violated its duty to bargain under Section 10(1)(e) of PERA. Charging Party represents a bargaining unit of professional employees, including certified teachers, employed by Respondent.

2 This matter was originally scheduled to be heard on July 1, 2003. Both the original hearing date and the second date of hearing were repeatedly rescheduled at the mutual request of the parties.

The charge alleges that in August 2002, Respondent unilaterally altered terms and conditions of employment when it directed and/or encouraged its high school teachers to create individual web pages to be posted on Respondent's web site. It also alleges that on or about October 3, 2002, Respondent unlawfully refused to bargain over the web page program on the grounds that it was a prohibited subject of bargaining.

Facts:

The Web Page Program

Respondent maintains a web site designed to communicate information about the District and its individual schools to parents and students, as well as other residents of the school district and the general public. Respondent seeks to expand the uses of the web site, and considers this expansion part of its compliance with state mandates requiring it to increase its use of technology and to encourage greater parent involvement in their children's education. Respondent's web site currently includes a "Parent Internet Viewer" where parents, using their personal identification numbers (pins), can access their children's attendance records and current grades. Teachers are required to keep an electronic grade book for each of their classes in which they may also record missed assignments or add notes about upcoming assignments, and to record attendance information electronically. This information is automatically uploaded onto the web site.

Sometime before the beginning of the 2002-2003 school year, the principal of Respondent's high school, Scott Grimes, had the idea of including individual teacher web pages on the District's web site. Grimes scheduled training on the design and creation of web pages on one of the in-service training days for high school teachers before the opening of school in August 2002. The high school teachers were divided into three groups and assigned to rooms with computers and several instructors. They were given handouts with instructions for creating a web page, accessing Respondent's web site, transferring their web pages to the site, and viewing their pages after they had been uploaded to the site. They were told that their web pages were to be completed by September 16, 2002. They were also told that they were to periodically update their web pages, and that if a web page was not updated every quarter it would be removed from the web site.

Among the handouts the teachers received was one that listed a series of items to be put on the web page. It was not made clear whether the teachers were required to include these items or whether the items were merely suggestions. Along with class description(s), syllabus, homework assignments/calendar for the semester, expectations for students, parent involvement opportunities, and how to contact the teacher, the handout directed or suggested that the teachers share some information about themselves, such as their hometown, education, hobbies and special interests, and include a photo of themselves. It also directed or suggested that teachers include a classroom scrapbook with photos of students in class, news stories about the class and stories about community involvement. The handout cautioned teachers not to use student names with the photos. Another handout was a "Checklist for Creating Web Pages." One item on the checklist warned the teachers to make sure the content on the page was "appropriate for all audiences (parents, students, community)." The materials the teachers received did not include guidelines for determining whether particular content was appropriate.

After the training sessions in August 2002, teachers came to Charging Party with a variety of

concerns about the web pages. These included whether a teacher's ability to create and maintain a web page would be part of his or her written evaluation, and whether the inability to do so might lead to discipline. Teachers worried that if their web pages provided only basic information, parents might perceive them as less effective or involved than their colleagues with more elaborate pages. There was also a concern about the absence of clear standards for determining what constituted appropriate content for the web site, and whether a teacher might be disciplined for inadvertently including inappropriate material. Some complained about the extra work they believed creating and updating a web page might entail. Teachers questioned whether posting personal information on the Internet was a good idea, and whether including student information was consistent with federal education privacy laws. Concerns were also expressed about hackers and the security of the web site, and whether posting materials on the Internet presented special copyright issues.

Some teachers completed web pages during the in-service session. After school began, Grimes scheduled additional training sessions during lunch periods and after school. On September 13, 2002, Charging Party President David Maloley spoke to Keith Konarska, Respondent's assistant superintendent for human services, about the web pages. Maloley asked Konarska if creating a web page was mandatory, and Konarska said it was not. Konarska sent the following e-mail to all high school staff later that day:

> It appears that some confusion has occurred around the September 16 timeline for getting staff websites up and running. Please understand that this is NOT a deadline or a mandate and if you choose not to move forward just let Ann Shelton know. [Emphasis in original].3

In his discussion with Konarska, Maloley mentioned some of the issues the teachers had raised. Konarska told Maloley that he would to meet with him to discuss his concerns, but would not bargain over these issues. On September 18, Maloley sent Respondent Superintendent Rick Kent a letter formally demanding to bargain "over the wages, hours and other terms and conditions of employment regarding the development and posting of individual high school teacher web pages on the District's web site through which no delivery of educational programs or services takes place." Maloley demanded that Respondent remove all individual teacher web pages from its web site until the parties reached agreement on these issues. In a memo dated September 20, Kent agreed to meet with Maloley but did not agree to remove the web pages from the site.

The parties agreed to discuss the web pages at a meeting set for October 3. In preparation for this meeting, Maloley and Charging Party Uniserv Director Marty Lankford drafted the following proposed letter of agreement (LOA).

1. The parties agree to form a Technology Acceptable Use Committee, with Association and Administration representation. The Committee shall consist of six (6) individuals, three (3) of whom shall be named by the Association and three (3) of whom shall be named by the Superintendent.

3 Ann Shelton was an information technology staff member assigned to the project.

2. The parties agree the development, posting, and maintenance of individual teacher web pages are not mandatory for bargaining unit members.

3. The parties agree that proficiency, or lack thereof, in the use of the individual web pages shall not be used in a negative fashion for evaluation purposes of a bargaining unit member.

4. The District agrees not to post employees' personal information on the District's web site and shall not require bargaining unit members to include personal information on individual web pages.

5. No employee shall be disciplined without just cause for alleged misuse or inappropriate usage the District's web site [sic] including individual teacher web pages.

6. The parties agree the Technology Acceptable Use Committee shall develop a common format with common content components as the acceptable standard for individual teacher web pages.

7. The District agrees to indemnify a bargaining unit member for any monetary settlement or award the bargaining unit member must satisfy as a result of a lawsuit brought by a third party, such as a student, parent, web master for a web site, software program, or other individual or entity, with regard to the bargaining unit member's use of the District's web site if such use falls within the acceptable guidelines set forth as determined by Technology Acceptable Use Committee.

8. The Employer agrees to provide insurance coverage with regard to the bargaining unit members' development, posting, maintenance and use of individual web pages that may result in any unintentional violation of copyright, patent, trademark, or any other intellectual property laws.

9. The parties agree that bargaining unit members will be released from liability for inappropriate acts committed by a student or any individual with regard to the District's web site, including, but not limited to, a student's inappropriate use of electronic mail communication, design and usage of a teacher's individual web page, or violation of this Letter of Agreement, or any federal, state or local law.

10. The Employer shall not (a) make any changes to the bargaining unit members' web pages without the prior written consent of the bargaining unit member; or (b) make any other use of the web page content other than as expressly authorized by the bargaining unit member.

11. The Employer shall not attach any Internet-link to bargaining unit members' web pages without authorization of the bargaining unit member.

At the meeting on October 3, Konarska and Kent told Maloley and the two other Charging Party

representatives present that Respondent was willing to discuss Charging Party's concerns, but would not bargain over teacher web pages because it felt this was a prohibited subject of bargaining. Maloley handed Konarska and Kent Charging Party's proposed LOA and explained Charging Party's position on each issue. Konarska and Kent said that they would be willing to form a committee of teachers and administrators to talk about the issues, but that Respondent was not going to enter into a LOA.

After the October 3, 2002 meeting, Charging Party informed its members that Respondent had refused to bargain over the issues in the LOA. It suggested that they not create web pages or, if they had already done so, that they ask that they be removed from the web site. In the spring of 2004, about ten percent of the high school teachers had web pages. As of the close of the hearing in this case, Respondent had not ordered any teacher to create a web page, and had not evaluated or disciplined any teacher based on his or her web page or lack thereof.

Respondent acknowledged that its goal is to have individual web pages for all its teachers, including elementary and middle school teachers. Respondent has not ruled out making creation of individual web pages mandatory for all its teachers, but is awaiting the Commission's decision in this unfair labor practice case before deciding how to proceed.

Purpose of the Program

All Respondent's high school teachers are required to provide the principal with the following written information for all classes they teach: class description, course overview, syllabus (outline of the material the students are going to cover), grading practices, attendance requirements, classroom rules, and course expectations. These materials are routinely given to students in handout form at the beginning of the semester. High school teachers are required to provide their students with homework assignments, but do not have to do this in written form or turn this information in to the principal.

Principal Grimes testified that he would not prohibit a teacher from using his web page for actual instruction - for example, providing work sheets that students could download. However, according to Grimes, the principal purpose of the web page program was to improve communication of the above information to students and their families. Both Principal Grimes and Superintendent Kent testified, without contradiction, that educational research has shown that the more information a school provides to students and families, the higher the student success rate. Kent testified that it is important for students to be aware of what they are expected to learn, and to clearly understand homework requirements and the class grading scale. Grimes and Kent agreed that having information about class requirements on a web site makes it easier for parents and students to access and understand it. Kent also noted that making this information available electronically leaves more time for instruction in class. According to Grimes, he encourages teachers to include personal information about themselves and their classrooms on their web pages because, in his opinion, this helps students feel more comfortable with their teachers and aids their achievement.

Discussion and Conclusions of Law:

Respondent first argues that it had no duty to bargain over the web page program because participation was voluntary. I agree with Respondent that it never required teachers to create web

pages. Although Respondent did not specifically tell teachers during the August 2002, training sessions that they did not have to create a web page, I believe that this was because it did not anticipate objections. After Charging Party notified Respondent of the teachers' concerns, Respondent promptly notified them that participation was voluntary. I find that Respondent did not make participation in the web pages program a condition of employment. I also find no indication that Respondent changed its evaluation criteria or that the web page program, as implemented, altered the teachers' terms and conditions of employment in any way.

The fact that participation in the program was voluntary, however, is not a defense to Respondent's refusal to bargain over the October 3, 2002, proposed LOA. Many, if not all, of the issues in the LOA impacted the wages, hours or working conditions of teachers and, under normal circumstances, would be mandatory subjects of bargaining even if participation in the program remained voluntary. For example, it is well established that the criteria used to formally evaluate teachers is a mandatory subject of bargaining. *Central Mich Univ Faculty v Central Mich Univ,* 404 Mich 268 (1978); *Spring Lake Pub Schs,* 1988 MERC Lab Op 337.

Respondent asserts, however, that its decision to implement the web page program, and the impact of the program on members of Charging Party's unit, are prohibited subjects of bargain under Section 15(3)(h) and (4) of PERA.

In 1994, the legislature amended Section 15 to make certain subjects prohibited subjects of bargaining between public school employers and the unions representing their employees. These include, in Section 15(3)(h):

> . . . decisions concerning the use of technology to deliver educational programs and services and staffing to provide the technology or the impact of these decisions on individual employees or the bargaining unit.

In *Michigan State AFL-CIO v Michigan Employment Relations Comm,* 212 Mich App 472, (1995), *aff'd* 450 Mich 362 (1996), the Court of Appeals upheld the constitutionality of the Section 15 amendments. The Court held, at 487, that the legislature's intent was to ensure that a public school employer could not be found guilty of an unfair labor practice by refusing to bargain over the subjects listed in Section 15, and also to prohibit these subjects from becoming part of an enforceable collective bargaining agreement. The Court emphasized that there was nothing in the statute prohibiting discussion between employers and unions on these topics.

Neither the courts nor the Commission have had occasion to interpret the language in Section 15(3)(h) quoted above. The paramount rule in statutory interpretation is to effect the intent of the legislature. *In re MCI,* 460 Mich. 396, 411 (1999). Statutory language is read according to its ordinary and generally accepted meaning. If the statute's language is plain and unambiguous, it must be assumed that the legislature intended its plain meaning. *Grossman v Brown,* 470 Mich 593, 598, (2004); *Tryc v Michigan Veterans' Facility,* 451 Mich. 129, 135-136 (1996).

Both parties argue that the language of Section 15(3)(h) is unambiguous, and both urge me to follow the plain wording of the statute. Both parties agree that Respondent's teacher web page program

is a "use of technology" within the meaning of the statute. However, they interpret the term "educational programs and services" differently. Charging Party argues that "educational programs and services" means instruction. It points out that Respondent acknowledged that its web page program had nothing to do with teaching classes over the Internet, or using the Internet in a classroom setting. Therefore, according to Charging Party, the web page program is not an educational program or service. Respondent argues that "educational programs and services" plainly includes programs that impact student academic achievement even though they do not involve classroom instruction. It argues that its web page program is an educational program or service because it improves essential communication between teachers and students and their parents, and because this communication has been proven to have an impact on student academic success.

I cannot agree with the parties that the term "educational programs and services" has a plain meaning. If there were any legislative history on this provision, I would certainly refer to it. Since there is not, however, I am forced to discern the legislature's intent from the language of the statute as a whole. I find Respondent's interpretation to be the better one. I believe that had the legislature intended to limit the scope of Section 15(3)(h) to the use of technology to deliver instruction, they would have used those words. The fact that they chose the broader terms "educational programs and services" suggests that they intended to extend the prohibition beyond instruction. Moreover, the fact that the legislature also included "staffing to provide the technology" and "the impact of these decisions on individual employees or the bargaining unit" as prohibited subjects suggests that they intended to give public school employers broad rights to act unilaterally in implementing new technology in the schools. Whether they intended this right to extend to services such as food service or maintenance is not something I need determine at this time. I conclude that individual teacher web pages, because they are a tool for communicating important educational information to students and parents, are an "educational program or service" within the meaning of Section 15(3)(h). I also conclude, therefore, that the decision to deliver this service and the impact of this decision on teachers or the bargaining unit are prohibited subjects of bargaining under Section 15. I find that all of the issues raised in Charging Party's October 3, 2002, LOA address either the decision to provide this service or the impact of the decision on teachers or the bargaining unit. I conclude, therefore, that Respondent cannot be required to bargain over the subjects raised in this LOA, or to enter into a written agreement on these subjects. As the Court made clear in *Michigan State, AFL-CIO,* however, the parties are not prohibited from discussing or reaching informal agreement on these subjects. I would urge the parties to do so, since it appears that the web page program's success may depend on these issues being addressed.

In sum, I find that Respondent did not alter the wages, hours, or terms or conditions of employment of members of Charging Party's bargaining unit when it implemented a voluntary program to encourage its high school teachers to create individual web pages in August 2002. I also conclude that Respondent did not have a duty to bargain over the implementation of its web page program, or the LOA proposed by Charging Party on October 3, 2002, because both the program and the subjects addressed in the proposed LOA were prohibited subjects of bargaining under Section 15(3)(h) of PERA. Based on the findings of fact and conclusions of law set forth in this decision, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____