STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 D-070
-and- Docket No. 12-000646-MERC

PONTIAC EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

The Allen Law Group, P.C., by George D. Mesritz, for Respondent

Law Offices of Lee and Corell, by Michael K. Lee and Megan R. McGown, for Charging Party

DECISION AND ORDER

On March 12, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in this matter, finding that Respondent Pontiac School District did not violate § 10(1)(a) or (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) or (e). The ALJ recommended the dismissal of the unfair labor practice charge filed by Charging Party Pontiac Education Association. On December 11, 2012, the ALJ issued an interim order finding that the allegations in Count II of the charge, regarding student evaluations, and Count IV, regarding the transfer of a bargaining unit member, should be dismissed because they alleged unilateral changes in prohibited subjects of bargaining. The ALJ's December 11, 2012 order also informed the parties that Count I, regarding the alleged unilateral changes in work rules, and Count III, regarding weekly progress reports, raised material issues of fact, for which she would schedule a hearing unless Charging Party withdrew those counts. Subsequently, Charging Party withdrew Counts I and III of the charge.[1] The ALJ then issued her Decision and Recommended Order, regarding the student evaluations and the transfer of a bargaining unit member, and recommended that we dismiss the charge.

The ALJ's Decision and Recommended Order was served on the parties in accordance with § 16 of PERA. On April 1, 2013, Charging Party filed exceptions and a brief in support of the exceptions. Respondent filed a brief in support of the ALJ's Decision and Recommended Order on April 9, 2013.

[1] We refer here to the specific counts in the charge and the issues raised by each in an effort to clarify how each issue was resolved.

In its exceptions, Charging Party contends that the ALJ erred in finding that the Respondent's use of student questionnaires and Respondent's involuntary transfer of a teacher were prohibited subjects of bargaining. Charging Party argues that the use of the questionnaires expanded bargaining unit members' job duties and was a unilateral change in their terms and conditions of employment. Charging Party also contends that language in the parties' expired contract and past practices concerning teacher transfers remained in effect and were binding on the Respondent at the time of the bargaining unit member's involuntary transfer. After carefully reviewing Charging Party's exceptions, we find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ except as modified herein. On August 31, 2011, the collective bargaining agreement expired and the parties entered into negotiations for a successor agreement. In December 2011, Charging Party learned of a questionnaire that Respondent planned to distribute to students. The questionnaire was designed to elicit students' opinions about their teachers. When Charging Party asked Respondent about the questionnaire, Respondent told Charging Party that the student questionnaire would not be used for evaluative purposes, but that the Michigan Department of Education required it. The questionnaire was not discussed during contract negotiations. Charging Party alleges that Respondent had a duty to bargain over the use of the questionnaire.

In December 2011, Respondent reduced its teaching staff. A teacher who had been displaced by the reduction in force accepted a new assignment at Respondent's middle school. On January 23, 2012, the teacher was accused of inappropriate conduct at the middle school and was then reassigned to the high school. The expired collective bargaining agreement allowed employees to be involuntarily transferred if there were layoffs or a reduction in force. The contract had no provision for involuntary transfers under other circumstances, nor was there an established practice of transferring employees for disciplinary reasons.

Discussion and Conclusions of Law:

Effective July 19, 2011, Public Act 103 amended § 15(3) of PERA to add several provisions prohibiting collective bargaining between public school employers and representatives of their employees over certain issues including: decisions regarding teacher placement or the impact of that decision; and decisions regarding the employer's performance evaluation system or the content of the performance evaluation of an employee. As indicated by the ALJ, the matters complained about by Charging Party are covered by§ 15(3)(j) and (l) of PERA which provide:

> (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.

* * *

> (l) Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.

For the reasons stated in the ALJ's decision, we agree that pursuant to § 15(3)(l) of PERA, the Employer has no duty to bargain over the use of questionnaires to obtain student opinions about teacher performance. We also agree with the ALJ that the involuntary transfer of the teacher was a decision made by the Employer about teacher placement and is a prohibited subject of bargaining under § 15(3)(j) of PERA.

Charging Party contends that because the parties had a collective bargaining agreement in effect on July 19, 2011, the ALJ erred "when she held that MCL 380.1248(1) applied to Pontiac." However, the ALJ made no such holding. MCL 380.1248 is part of the revised school code, which was amended by 2011 PA 102. PA 102 was enacted the same day as PA 103, which amended PERA. The ALJ's holdings were based on § 15(3) of PERA, MCL 423.215(3) as amended by PA 103. Although both PA 102 and PA 103 were enacted on the same day and both are related to issues affecting public school employers and their employees, the two laws are not the same. MCL 380.1248 directs public schools to take certain actions. Section 15(3) of PERA, on the other hand, limits the subjects over which public school employers may bargain with their employees' representatives.

Charging Party further contends, in reliance on MCL 380.1248(2), that because the parties had a contract in effect when Public Acts 102 and 103 were enacted, the contract language remains in effect and Public Acts 102 and 103 do not apply. Charging Party's reliance on MCL 380.1248 is misplaced. Although MCL 380.1248(2) exempts public school employers from complying with provisions of MCL 380.1248(1) that conflict with a pending collective bargaining agreement, that exemption ends when the collective bargaining agreement expires. When the parties' collective bargaining agreement expired on August 31, 2011, the Employer was no longer exempt from the requirements of MCL 380.1248(1). At that point, the Employer was required to comply with MCL 380.1248(1) and, pursuant to § 15(3) of PERA, was prohibited from bargaining over decisions about teacher placement or performance evaluations.

Charging Party argues that the Employer had a duty to continue to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reached agreement or impasse. However, after the enactment of 2011 PA 103, provisions of the parties' expired collective bargaining agreement that applied to teacher placement and performance evaluations are no longer mandatory subjects of bargaining. Those provisions are now prohibited subjects of bargaining. Therefore, the Employer is no longer required to comply with those terms of the expired contract. The same is true of past practices that may have modified the parties' collective bargaining agreement, if those past practices applied to teacher placement or performance evaluations.

On exceptions, Charging Party asserts that Respondent informed it that the student questionnaire would not be used for evaluative purposes. Charging Party argues that if the student questionnaire was not to be used for evaluative purposes, then bargaining over the questionnaire is not prohibited by § 15(3)(l). On that basis, the Union contends that the Employer had a duty to bargain over the use of the student questionnaire because it expanded employee job duties. This claim was not made in the charge, nor was it made in Charging Party's May 7, 2012 response to the ALJ's order to show cause, nor in Charging Party's July 17, 2012 Brief in Support of Response in Opposition to Motion for Summary Disposition. Moreover, Charging Party failed to amend the charge to allege that the questionnaire caused a significant increase in the employees' duties. Since these issues were not raised before the ALJ, they are not properly before us at this time. See *City of Detroit*, 1993 MERC Lab Op 131, 132; 6 MPER 24028; *Teamsters Local 580*, 1991 MERC Labor Op 575, 576.

Additionally, Charging Party contends that the ALJ erred by finding that the Union failed to show that the use of the student questionnaires affected employees' wages, hours, or terms and conditions of employment. However, Charging Party offered little, if any, evidence in support of its claim that use of the questionnaires increased employee duties. In support of its contention that it offered evidence establishing a significant increase in employees' duties, Charging Party points to an affidavit by the Union president. There, the Union president asserts: "That the student perception requirement materially alters the Charging Party Association's Members' job duties because it requires the distribution, collection, summation and reporting of each and every evaluation for each student on a weekly basis." The affidavit was attached to Charging Party's Brief in Support of Response in Opposition to Motion for Summary Disposition filed July 17, 2012, in which Charging Party argued, regarding the weekly progress reports, that this weekly evaluation of students greatly increased the duties and time spent by the bargaining unit members. However, these allegations appear to be part of Charging Party's efforts to substantiate Count III of the charge, one of the counts that Charging Party has withdrawn.

When this matter was before the ALJ, Charging Party failed to offer evidence that would establish that the use of the student questionnaires was related to the requirement of weekly progress reports or that it otherwise significantly increased employee duties. Moreover, the allegations in the exceptions relating to an increase in duties and time spent by bargaining unit members raise factual questions that could have been heard by the ALJ had Charging Party timely asserted that the use of the student questionnaires significantly increased the employees' job duties. If there is a connection between the facts alleged regarding the weekly progress reports, discussed in Count III, and student questionnaires, raised in Count II, that connection should have been raised in the charge, in the response to the ALJ's Order to Show Cause or at some point prior to Charging Party's withdrawal of Counts I and III. The ALJ offered to schedule a hearing on the factual issues raised by Counts I and III. Rather than proceeding with the hearing, Charging Party chose to withdraw Counts I and III and to forego presenting evidence on the factual issues. Accordingly, we find that Charging Party failed to offer sufficient evidence to show that the Employer's action in issuing questionnaires to students was a change in a mandatory subject of bargaining.

In conclusion, we find that the Employer had no duty to bargain over the use of the student questionnaires or the involuntary transfer of the teacher as Charging Party has failed to establish that either issue involved a mandatory subject of bargaining. We have also considered all other

arguments submitted by the Charging Party and conclude that they would not change the result in this case. The ALJ's decision is affirmed.

ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: March 17, 2013

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 D-070
Docket No. 12-000646-MERC

-and-

PONTIAC EDUCATION ASSOCIATION,
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APPEARANCES:

The Allen Law Group, P.C., by George D. Mesritz, for Respondent

Law Offices of Lee and Corell, by Michael K. Lee, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On April 6, 2012, the Pontiac Education Association filed the above charge with the Michigan Employment Relations Commission (the Commission) against the Pontiac School District. The charge alleges that Respondent violated §§10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1) by unilaterally altering terms and conditions of employment for members of Charging Party's bargaining unit. Pursuant to Section 16 of PERA, the charge was assigned for hearing to Administrative Law Judge Julia C. Stern from the Michigan Administrative Hearing System.

On June 26, 2012, Respondent filed a motion for summary dismissal. Charging Party filed a response to the motion on July 17, 2012 and Respondent filed a reply brief on July 20, 2012. On December 11, 2012, I issued an interim order on Respondent's motion. I concluded that two of the four allegations in the charge, Count I and Count III, should be summarily dismissed. I found that the other two allegations involved disputed issues of material fact which required an evidentiary hearing. I stated in the order that if the allegations in Counts II and IV were not withdrawn, I would schedule an evidentiary hearing to permit Charging Party to present evidence on these allegations. I noted that since the order did not dismiss or sustain the unfair labor practice charge in its entirety, it was an interim order under Rule 161(6) of the Commission's General Rules, 2002 AACS, R423.161(6) and could not be appealed directly to the Commission. I stated in the order that my Decision and Recommended Order, when issued, would incorporate the conclusions of law contained in the interim order and would recommend that the Commission dismiss Count I and

Count III of the charge.

On March 7, 2013, Charging Party withdrew Count II and Count IV of the charge and requested that I issue a Decision and Recommended Order on Count I and Count III. Based on the facts set out in the charge, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of certified and other instructional personnel, including teachers, employed by Respondent. In Count II of its unfair labor practice charge, Charging Party alleges that Respondent violated §§10(1)(a) and 10(1)(c) of PERA and its duty to bargain when, during the first week of January 2012, it distributed questionnaires to students asking for their opinions about their teachers without giving Charging Party an opportunity to demand bargaining over the questionnaire. In Count IV of the charge, Charging Party alleges that Respondent violated its duty to bargain in good faith when, in January 2012, Respondent transferred a bargaining unit member for disciplinary reasons, in contravention of language in the parties' expired contract and the parties' established practice of limiting involuntary transfers to situations involving layoffs or the elimination of positions.

Respondent's Motion for Summary Disposition:

Respondent asserts that the allegations in Counts II and IV of the charge should be dismissed as a matter of law because the alleged changes involved prohibited subjects of bargaining.

Facts:

Count I - Student Questionnaires

The pertinent facts, as asserted by Charging Party in its pleadings, are as follows. The most recent collective bargaining agreement between Charging Party and Respondent expired on August 31, 2011, and the parties began negotiations for a successor agreement. Sometime before the beginning of the second semester of the 2011-2012 school year, Respondent created a questionnaire to be filled out by all students in grades three through six. The introductory paragraph of the questionnaire stated, "The purpose of the student survey is to allow you to give ideas to the teacher about how this class might be improved. You are encouraged to add your comments and suggestions at the bottom of this survey." The questionnaire asked for the name of the student's teacher, the student's school, and the student's grade. It did not ask for the student's own name. The questionnaire asked students to check, "yes," "sometimes" or "no," next to nineteen questions, including whether the teacher made his classroom a good place to be, made learning interesting and meaningful, explained things so he could understand them, graded fairly, and encouraged him to interact with other students in a positive way. The survey also included three open-ended questions, "What do you like about this class and/or teacher?" "Is there anything about this class that makes you unhappy?" and "What do you wish this teacher would do differently to make this a better class for you?"

The existence of this questionnaire came to the attention of Charging Party President Aimee

McKeever in December 2011. Respondent had not raised the issue of the questionnaire at the bargaining table and the parties had never discussed it. Sometime before January 5, 2012, Respondent distributed the questionnaire to teachers and told them to have their students fill it out. On January 5, McKeever asked Interim Associate Superintendent Kelley Williams about the questionnaire. Williams told her that the questionnaire was not for the purpose of evaluating Charging Party's members. However, she said it was mandated by the Michigan Department of Education (MDE). In an email later that day, McKeever asked Williams to provide her with documentation that the questionnaire was required by the MDE. On January 9, Williams emailed McKeever a document, apparently created by the MDE, describing a "School Data/Profile Analysis." According to this document, a school data/profile analysis is a report to be completed by a school district as part of the process of developing and monitoring a school improvement plan. The document listed "perception data" as one of twelve required components of the report. Williams told McKeever that documented "student perception data" was a required element of the report.

Count IV - Disciplinary Transfer

The pertinent facts, as set out in Charging Party's pleadings, are as follows. The parties' expired collective bargaining agreement allowed employees to be involuntarily transferred to a different assignment in connection with a layoff or reduction in force. There was no provision in the contract for involuntary transfers under other circumstances, and no established practice of transferring employees for disciplinary reasons.

In December 2011, Respondent reduced its staff and employees were laid off. A member of Charging Party's unit, Janet Threlkeld-Brown, was displaced by the reduction in force and selected a new assignment at Respondent's middle school. Threlkeld-Brown's new assignment was to begin on January 23, 2012. During the week of January 16, 2012, Threlkeld-Brown visited the middle school to move her materials and examine the records of her new students. On January 23, Threlkeld-Brown had a meeting at the middle school with the middle school principal and other administrators. During this meeting, Threlkeld-Brown was accused of engaging in inappropriate conduct during her visits to the middle school the previous week. After the meeting, Threlkeld-Brown was informed that she was being reassigned to Respondent's high school, where she continued to work for the remainder of the 2011-2012 school year.

Discussion and Conclusions of Law:

Student Questionnaires

In 2011 PA 103, the Legislature amended §15 of PERA to make certain topics previously considered mandatory subjects of bargaining prohibited subjects of bargaining for public school employers and the unions representing their teachers. Among the topics made prohibited subjects were performance evaluations. Per §15(3)(l) of PERA, the following are now prohibited subjects of bargaining:

> Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions

> concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.

The charge alleged that Respondent had an obligation to bargain over the questionnaires distributed to students because they purported to give students input into the evaluation of the performance of Charging Party's members. Respondent pointed out in its motion that decisions concerning the content of performance evaluations for teachers are now prohibited, rather than mandatory, subjects of bargaining. According to Respondent, it had no duty to bargain over a decision to include student input as part of its evaluation of teacher performance.

In its response to Respondent's motion to dismiss, Charging Party asserted that it was explicitly told by Respondent that the purpose of the student questionnaires was not to evaluate the performance of individual teachers. It pointed out that Respondent provided Charging Party President McKeever with a document suggesting that the questionnaires would be used only to assess students' aggregate perception of their teachers' performance, an assessment that Respondent was required to make as part of its performance improvement plan. I note that if that was, in fact, the case, it is not clear why the questionnaire asked students for the names of their teachers. Whatever the actual purpose of the questionnaire, I agree that after the passage of 2011 PA 103 Respondent no longer had a duty to bargain with Charging Party over a decision to consider students' perceptions of their teachers in evaluating teacher performance. The problem with Charging Party's response to the motion is that it has not provided an explanation for why, if the questionnaire was not to be used for evaluating teacher performance, the questionnaire affected teachers' wages, hours, or terms and conditions of employment. I conclude that the student questionnaire was not a mandatory subject of bargaining, and that Respondent had no duty to bargain over its content or distribution. I conclude, therefore, that Respondent did not commit an unfair labor practice by failing to give Charging Party an opportunity to bargain over the questionnaires before distributing them to students.

Disciplinary Transfer

Another of the topics made prohibited subjects of bargaining for public school employers and the unions representing their teachers by 2011 PA 103 was "teacher placement." Section 15(3)(j) of PERA now makes a prohibited topic:

> 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.

Respondent points out that the Legislature placed no limitations on the types of placement decisions covered by this subsection, and it argues that the language should be interpreted broadly. Respondent asserts that under subsection 15(3)(j) any placement decision is a prohibited subject of bargaining. It argues that it had no obligation to bargain over the transfer of Janet Threlkeld-Brown from the middle to the high school for disciplinary reasons because its decision to transfer her was a "decision … regarding teacher placement." In its response to the motion, Charging Party asserts that the expired collective bargaining agreement permitted involuntary transfers only in connection with a layoff or reduction in force. It argues that this language, and the parties' established practice of not transferring employees for disciplinary reasons, remained in effect and binding on Respondent when Threlkeld-Brown was involuntarily transferred.

I agree with Respondent that §15(3)(j) of PERA makes all decisions over teacher placement, including a decision to transfer a teacher for disciplinary reasons, prohibited subjects of bargaining. In *Michigan State AFL-CIO* v *MERC*, 453 Mich 362, 486-487, the Court concluded that by making certain topics prohibited subjects of bargaining, the Legislature intended to "foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them or that they could ever become part of a collective bargaining agreement." Because transfer policies are now prohibited subjects of bargaining, a public school employer no longer has a duty to bargain before altering, or simply refusing to adhere to, teacher transfer policies which existed prior to the passage of 2011 PA 103. I conclude, therefore, that Respondent did not violate PERA when it unilaterally decided to transfer Threlkeld-Brown to a different school for disciplinary reasons in January 2011.

In accord with the conclusions of law set forth, I recommend that the Commission grant Respondent's motion for summary disposition and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____