STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 D-079

-and-

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

APPEARANCES:

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

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

DECISION AND ORDER

On December 11, 2012, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motion for Summary Disposition in the above matter finding that the Pontiac Education Association's charge against Respondent Pontiac School District did not state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.201 – 423.217. The ALJ found that Respondent had not violated § 10(1)(a) or (e) of PERA, as alleged in the charge when it promulgated a new layoff and recall policy for teachers and issued layoff notices to teachers informing them that they would be laid off effective April 12, 2012. On this basis, the ALJ recommended that the Commission dismiss the unfair labor practice charge in its entirety. The Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA. On January 3, 2013, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On January 11, 2013, Respondent filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Charging Party contends that the ALJ erred in finding that the procedures relating to layoff and recall, the past practice of permitting teachers to meet with administrators before their positions were abolished, and the past practice of permitting teachers with sufficient seniority to avoid layoff by choosing an assignment to

a vacant position are prohibited subjects of bargaining. Charging Party further contends that the language of the parties' collective-bargaining agreement in effect on July 19, 2011, continued in effect on May 11, 2012, and remains in effect. Charging Party further contends that the provisions of MCL 380.1248(1) do not apply. Charging Party also argues that the ALJ erred by not allowing the matter to proceed to hearing. Upon review of Charging Party's exceptions, we find them to be without merit.

Factual Summary:

We agree with the ALJ that the material facts are not in dispute and adopt the facts as found by her. We repeat them in summary here. Charging Party and Respondent were parties to a 2007 - 2011 collective bargaining agreement that, in article 10, set forth the parties' agreement with respect to reductions in personnel, layoff, and recall. Article 10, section A prohibited Respondent from reducing bargaining unit personnel at any time other than the beginning of a semester and required that Respondent meet and confer with the Union before laying off bargaining unit personnel. Article 10, section A also required that Respondent give notice of second semester layoffs by the preceding December 1, and notice of layoffs for the next academic year by the preceding May 1. Other sections of article 10 prescribed the order of layoffs based on reverse "continuous service" and set forth specific procedures that were to be followed by Respondent in determining which teachers would be laid off or recalled. The collective bargaining agreement expired on August 31, 2011.

By past practice, the parties had established other procedures relating to layoffs. Past practice provided that a bargaining unit member whose position was being eliminated was permitted to meet with an administrator before the effective date of the position's elimination. Also, a bargaining unit member displaced by the elimination of a position, but with sufficient seniority to avoid layoff was allowed to choose any available vacant position.

On or about March 19, 2012, prior to reaching a successor agreement, Respondent promulgated a new layoff and recall policy for teachers. The new policy was based on the provisions of § 1248 of the Revised School Code, MCL 380.1248, as amended by 2011 Public Act 102, and included criteria for deciding which teachers would be laid off based on teacher performance. The new policy does not address the timing of layoffs or other issues covered in article 10, section A of the parties' expired contract. Respondent also announced the layoff of certain teachers, effective April 12, 2012. The layoffs were announced after the December 1 deadline set by article 10, section A of the expired contract and without a prior meeting with Charging Party. Teachers who were displaced but not laid off were involuntarily transferred by Respondent to new positions. These teachers were not allowed to select from available vacancies as they would have been under the parties' past practice.

Around May 11, 2012, the parties reached a tentative agreement for a successor contract, which was subsequently ratified by both parties. The successor contract included a letter of understanding (LOU), which acknowledged that certain specified

provisions of the collective bargaining agreement are not enforceable to the extent that they apply to bargaining unit members subject to the Teacher's Tenure Act. The LOU further provided that the specified provisions would be reinstated should 2011 Public Act 103 be repealed by voter referendum or be found unconstitutional or otherwise legally ineffective by a court or administrative agency. The LOU also provided that the parties did not agree with respect to the enforceability of certain other provisions and identified some of those disputed provisions. Although certain sections of article 10 were listed in the group of provisions that the parties acknowledged were unenforceable to the extent that they applied to bargaining unit members subject to the Teacher's Tenure Act, section A was not included in that group, nor was it included in the group of disputed provisions.

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, personnel decisions when hiring or conducting a recall after a staffing reduction, or the impact of such decisions. The matters complained about by Charging Party are covered by § 15(3)(j) and (k) of PERA which provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
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> * * *
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> (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.
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> (k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, 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 the Employer had no duty to bargain over the procedures relating to the lay off or recall of teachers in April 2012 as those procedures are prohibited subjects of bargaining under § 15(3)(k) of PERA.

We also agree with the ALJ that in 2012, Respondent had no duty to adhere to past practices, or bargain about practices that permitted teachers to meet with administrators before their positions were abolished, and that gave displaced teachers an opportunity to choose their new assignments from available vacancies. The practices in question affected decisions about teacher placement and are prohibited subjects 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." We disagree; the ALJ made no such holding. Moreover, as we stated in *Pontiac Sch Dist*, 27 MPER ___ (Case No. C12 D-070, issued March 17, 2014):

> 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.
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> 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 . . . .

Charging Party argues here that the Employer had a duty to continue to apply the terms of the expired contract. Neither party may take unilateral action on a *mandatory* subject of bargaining unless the parties arrive at an impasse in their negotiations or there is a clear and unmistakable waiver. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277 (1978); *Wayne Co Gov't Bar Ass'n v Wayne Co*, 169 Mich App 480, 486 (1988); aff'g 1987 MERC Lab Op 230. However, in interpreting § 15(3) and (4) of PERA, the Supreme Court in *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), held that a "prohibited" subject of bargaining is synonymous with

an "illegal" subject of bargaining. An employer is not required to bargain to impasse or agreement before taking unilateral action on an illegal subject of bargaining, and although the parties to a collective bargaining relationship are not expressly forbidden from discussing an illegal subject, a contract provision regarding an illegal subject is unenforceable. *Michigan State AFL-CIO, Id.*, n 9; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55, n 6 (1974).

After 2011 PA 103 was enacted, provisions of the parties' expired collective bargaining agreement that applied to decisions regarding layoff and recall or teacher placement that once were mandatory subjects of bargaining became prohibited subjects of bargaining pursuant to § 15(3)(j) and (k). Therefore, the Employer is no longer required to comply with those provisions 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 decisions regarding layoff and recall or teacher placement. See *Pontiac Sch Dist*, 27 MPER ___ (Case No. C12 D-070, issued March 17, 2014). Past practices that applied to mandatory subjects of bargaining prior to the adoption of 2011 PA 103 but now conflict with the provisions of § 15(3) are not binding on the parties after the collective bargaining agreement has expired. The parties' past practice allowing displaced teachers to select from available vacancies is a practice affecting teacher placement and is now a prohibited subject of bargaining. The same is true of the past practice that allowed teachers to meet with administrators before their positions were abolished. Accordingly, decisions on such matters are to be made by the public school employer. Respondent did not breach its duty to bargain by failing to adhere to, or bargain over, past practices affecting teacher placement at the time of the April 2012 reduction in force.

Charging Party also argues that the language of the parties' 2007-2011 contract, which expired on August 31, 2011, was in effect on May 11, 2012 (the date the parties reached a tentative agreement on a new contract) and remains in effect today. The fact that the parties' successor agreement incorporates provisions from the expired contract does not give effect to the provisions that apply to matters that are now prohibited subjects of bargaining. In *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996), when discussing the amendments to PERA made by 1994 PA 112, the Court of Appeals concluded that what the Legislature "intended was 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." The Court went on to explain that § 15(3) and (4) "evince a legislative intent to make public school employers solely responsible for these subjects by prohibiting them from being the subjects of enforceable contract provisions and by eliminating any duty to bargain regarding them." *Id.* We find that same legislative intent to be present in the 2011 additions to § 15(3). Provisions in the expired contract regarding decisions on procedures for layoff and recall and decisions about teacher placement were prohibited subjects of bargaining when the parties entered into the successor agreement. After the passage of 2011 PA 103, the parties were prohibited by

§ 15(3)(j) and (k) of PERA from bargaining over those issues. Accordingly, provisions regarding such matters contained in the successor agreement are unenforceable.

We also find no merit in Charging Party's argument that § 15(3)(k) makes "only topics addressed in 2011 PA 102, . . . i.e., the selection of employees for layoffs and recall, prohibited subjects of bargaining." As the ALJ explained, § 15(3)(k) is broadly worded to encompass decisions about procedures used by public school employers when conducting a layoff or recall. We find nothing in the unambiguous language of § 15(3)(k) to indicate that its applicability is limited to decisions about the selection of employees for layoff or recall.

Charging Party further argues that the ALJ erred by not allowing the matter to proceed to hearing to determine "whether 'layoff and recall procedures' relating to the timing of layoffs, are mandatory versus permissive subjects." The question of whether layoff and recall procedures, including procedures regarding the timing of layoffs, are mandatory or permissive has been resolved by the passage of PA 103. Such matters are prohibited subjects of bargaining as a matter of law under § 15(3)(k) of PERA. Charging Party has raised no material issue of fact. Therefore, there was no need for a hearing.

We have considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case. We agree with the ALJ that the facts alleged in the charge do not support a finding that Respondent breached its duty to bargain. This matter was appropriately resolved on summary disposition as the charge failed to state a claim upon which relief can be granted under PERA. Accordingly, we affirm the ALJ's Decision and Recommended Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission. 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: May 20, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 D-079
Docket No. 12-000690-MERC

-and-

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, for Charging Party

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

On April 23, 2012, the Pontiac Education Association filed the above charge with the Michigan Employment Relations Commission (the Commission) against the Pontiac School District alleging that Respondent violated §§10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1). 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.

The charge was amended on May 1, 2012. On May 31, 2012, Charging Party withdrew the first and second allegations of the charge as amended. On June 19, 2012, Respondent filed a motion for summary disposition of the remaining allegation under Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, asserting that the charge should be dismissed because it failed to state a claim upon which relief could be granted under PERA. Charging Party filed a response opposing the motion on July 9, 2012, and Respondent filed a reply to the response on July 13, 2012. Based on the facts set forth in Charging Party's pleadings, 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. The charge alleges that Respondent repudiated the parties' collective bargaining agreement, specifically Article 10(A) of that agreement, and unilaterally changed existing terms and conditions of employment, when it laid off members of Charging Party's bargaining unit effective April 12, 2012.

Facts:

The Collective Bargaining Agreement

Article 10 of the parties' 2007-2011 collective bargaining agreement was entitled "Reduction in Personnel, Lay Off and Recall." Article 10(A) read as follows:

> No reduction in personnel shall be made during the term of the school year, unless the Board and the Association agree to meet and confer at times of economic necessity to discuss various alternatives to contract staffing constraints and/or to time deadlines as they relate to layoff and economic necessity. In the event staff reduction is deemed necessary, teachers to be laid off shall be notified of such action by May 1 preceding the next school year. In case of the second semester, teachers shall be notified no later than December 1. There will be no layoffs that would be effective at anytime other than the beginning of a semester.

The remaining sections of Article 10 required Respondent to lay off employees in order of reverse "continuous service" as defined in the agreement; provided that no tenured teacher would be laid off until all probationary teachers were laid off; required Respondent to place all laid off teachers on one of five recall lists in order of continuous service and to allow teachers to choose whether to be placed on additional lists for positions for which they were qualified; required Respondent, when vacancies were identified, to recall teachers from the appropriate recall list; and set out in detail how recalls were to be managed.

Other procedures relating to layoffs, not explicitly set forth in the contract, had become established by the past practice of the parties. Any bargaining unit member whose position was scheduled for elimination was entitled to meet with an administrator before the effective date of the position's elimination. In addition, a unit member displaced by the elimination of a position, but with sufficient seniority to avoid layoff, was allowed to choose any available vacant position.

The 2007-2011 collective bargaining agreement expired on August 31, 2011, and the parties began bargaining over the terms of a successor agreement.

Amendments to PERA and the School Code

On July 19, 2011, in 2011 PA 103, the Legislature amended §15 of PERA to

make certain topics prohibited subjects of bargaining for public school employers and the unions representing their teachers. Pursuant to §15(3)(j) and (k) of PERA, the following became prohibited topics:

> (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.
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> (k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380. 1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

Section 1248 of the School Code, MCL 380.1248, was also amended effective July 19, 2011. This statute, as amended by 2011 PA 102, now reads in pertinent part as follows:

> (1) For teachers, as defined in section 1 of article I of 1937 PA 4, MCL 38.71, all of the following apply to policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position by a school district or intermediate school district:
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> > (a) Subject to subdivision (c), the board of a school district or intermediate school district shall not adopt, implement, maintain, or comply with a policy that provides that length of service or tenure status is the primary or determining factor in personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position.

> (b) Subject to subdivision (c), the board of a school district or intermediate school district shall ensure that the school district or intermediate school district adopts, implements, maintains, and complies with a policy that provides that all personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, are based on retaining effective teachers. The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under section 1249 is not given any preference that would result in that teacher being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under section 1249. Effectiveness shall be measured by the performance evaluation system under section 1249, and the personnel decisions shall be made based on the following factors:
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> . . .
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> (c) Except as otherwise provided in this subdivision, length of service or tenure status shall not be a factor in a personnel decision described in subdivision (a) or (b). However, if that personnel decision involves 2 or more employees and all other factors distinguishing those employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker.
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> (2) If a collective bargaining agreement is in effect for employees of a school district or intermediate school district as of the effective date of this section and if that collective bargaining agreement prevents compliance with subsection (1), then subsection (1) does not apply to that school district or intermediate school district until after the expiration of that collective bargaining agreement.

The Layoffs

The parties had not reached agreement on a new contract, when, on or about March 19, 2012, Respondent promulgated a new layoff and recall policy for teachers. The new policy altered the criteria for selecting teachers for layoff and recall set out in Article 10 to comply with §1248(1)(b) of the School Code, as amended. The policy did not address any of the topics covered by Article 10(A) of the expired contract. Around this same time, Respondent issued layoff notices to teachers informing them that they would be laid off effective April 12, 2012. Respondent did not seek to meet with Charging Party before announcing these layoffs, and no teacher received notice of his or

her layoff prior to December 1, 2011. Teachers who were displaced by the elimination of their positions, but not laid off, were not allowed to choose an available vacancy, but instead were involuntarily transferred to a new position selected by Respondent.

On or about May 11, 2012, the parties reached a tentative contract agreement which was later ratified by both parties. The new contract included a letter of understanding (LOU) which provided that certain provisions of the collective bargaining agreement were not enforceable as they applied to bargaining unit members who were subject to the Michigan Teacher's Tenure Act, but that these provisions would be immediately reinstated into the agreement should a voter referendum annul any provision of 2011 PA 103 or a court or administrative agency issue a decision that all of part of that law was unconstitutional or ineffective. The LOU also stated that the parties did not agree as to whether a number of additional provisions were unenforceable as a result of 2011 PA 103, and that neither party was waiving its right to contend that such provisions were or were not enforceable. The LOU identified some of these provisions, by article. Article 10(A) was not specifically mentioned in that section or anywhere else in the LOU.

Discussion and Conclusions of Law:

The charge alleges that Respondent violated its duty to bargain by repudiating the parties' contract, specifically Article 10(A) of that agreement, and unilaterally changing existing terms and conditions of employment as set out in that article and as established by the past practice. Charging Party does not dispute Respondent's right to implement changes in the method of selecting the teachers to be laid off, as set forth in the new policy it issued on March 19, 2012. However, Charging Party argues that the restrictions on Respondent's right to lay off set out in Article 10(A) of the expired contract, and other layoff procedures established by past practice, remained in effect when unit employees were laid off in April since Respondent never explicitly altered them. It also argues that the restrictions contained in Article 10(A) of the expired agreement remained in effect pursuant to §1248(2) of the School Code.

Respondent's motion asserts that the charge should be dismissed because 2011 PA 103 made layoff decisions a prohibited subject of bargaining. According to Respondent, pursuant to §15(3)(k) of PERA, all collective bargaining provisions relating to layoffs, including Article 10(A) of the expired agreement, are no longer enforceable. Respondent asserts that it was not required to formally announce that it would no longer adhere to Article 10(A). It also maintains that MCL 380.1248 is irrelevant to the question of whether it had an obligation to adhere to the restrictions on its right to lay off set forth in that article. Finally, it notes that the parties' collective bargaining agreement expired on August 31, 2011, more than six months before the layoffs in April 2012.

As Respondent points out, there was no collective bargaining agreement in effect between the parties in April 2012. However, it is well established that once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning that subject, and neither party may take unilateral action on the subject absent an impasse in negotiations. *NLRB v Wooster Division of Borg-Warner*

Corp, 356 US 342, (1958); *NLRB v Katz,* 369 US 736 (1962); *Detroit Police Officers Ass'n v City of Detroit,* 391 Mich 44, 55 (1974). Wages, hours, and other terms and conditions of employment established by a collective bargaining agreement which are mandatory subjects of bargaining survive the expiration of the agreement by operation of law during the bargaining process. A public employer, therefore, has the obligation during the bargaining process to continue to apply those wages, hours, and other terms and conditions of employment until such time as impasse is reached. *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage,* 134 Mich App 466, 472 (1984). An employer is also prohibited from unilaterally altering terms and conditions of employment created by past practice rather than by explicit agreement. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be a tacit agreement that the practice would continue for the practice to develop into a term or condition of employment. *Port Huron Education Ass'n v. Port Huron Area School Dist,* 452 Mich 309, 325 (1996) quoting *Amalgamated Transit Union v. Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455 (1991). In short, if the layoff procedures contained in Article 10(A) of the expired contract, and others established by past practice, were mandatory subjects of bargaining, Respondent could not lawfully either alter or ignore them without first bargaining to impasse.

A public employer has an inherent managerial right under PERA to determine the size and scope of the services it provides. A public employer's decision to lay off employees is, therefore, a nonmandatory subject, and an employer has no duty to bargain over any provision that unduly restricts its right to make decisions regarding the scope of services. *Local 1277 AFSCME v Centerline*, 414 Mich 642, 658 (1982). Long before the passage of 2011 PA 103, the Commission held that "layoff and recall procedures" were mandatory subjects. *Buena Vista Sch Dist,* 1976 MERC Lab Op 1017, 1018; *Galien Twp Schs*, 1976 MERC Lab Op 924, 930 (no exceptions). These "layoff and recall procedures" included the selection of the employees to be laid off and the method of their recall. See *Eastern Mich Univ*, 1976 MERC Lab Op 679, 686 (no exceptions). The Commission does not appear to have ruled on the question of whether "layoff and recall procedures" relating to the timing of layoffs, such as a requirement that the employer give a specified amount of advance notice to employees and/or the union before the effective date of the layoffs, are mandatory versus permissive subjects.

When the Legislature adopted 2011 PA 103, it clearly intended to alter existing law concerning the scope of bargaining for public school employers and the unions representing their teachers. At the same time, in 2011 PA 102, it prohibited school districts from adopting or maintaining layoff and recall procedures for teachers which use seniority as the primary factor in selecting the employees to be laid off or recalled, although it permitted school districts whose collective bargaining agreements contained such procedures to retain them until the agreements expired. Since §15(3)(k) of PERA specifically references §1248 of the School Code, amended by 2011 PA 102, an argument can be made that the Legislature intended §15(3)(k) to make only the topics addressed in 2011 PA 102, i.e., the selection of employees for layoff and recall, prohibited subjects of bargaining. This is not, I find, a reasonable interpretation of the

statute as written. Section 15(3)(k) is broadly drafted to encompass all "decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction," decisions made by the employer pursuant to these policies, and the impact of these decisions on the employee or bargaining unit. Had the Legislature intended to limit the scope of §15(3)(k) to selection procedures, it could have done so without using the broad language in this section. I conclude that §15(3)(k) plainly and unambiguously makes all procedures relating to layoff and recall, including requirements that an employer meet with the union or employees before laying them off and provisions for advance notice of layoff, prohibited subjects of bargaining under PERA. I also conclude that the subjects covered by Article 10(A) of the parties' expired contract, and any requirement established by practice that employees be allowed the opportunity to meet with an administrator before their position is abolished, became prohibited subjects of bargaining with the passage of §15(3)(k). Because layoff procedures were no longer mandatory subjects of bargaining, Respondent had no obligation under §15 of PERA to adhere to these established procedures when it laid off teachers in April 2012. Finally, §15(3)(j) of PERA makes decisions regarding teacher placement and the impact of those decisions prohibited subjects. I conclude that this section also made the parties' practice of permitting teachers to choose their new assignments after being displaced by a layoff a prohibited subject of bargaining. Therefore, Respondent did not violate PERA by refusing to allow this choice after the April 2012 layoffs. Based on the facts as alleged by Charging Party and the conclusions of law set forth above, I find that Respondent did not violate its duty to bargain in this case. I recommend that the Commission grant Respondent's motion for summary dismissal 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: _____