STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C13 B-033

-and-

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

APPEARANCES:

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

Law Offices of Lee & Correll, by Michael K. Lee, for Charging Party

DECISION AND ORDER

On October 18, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motion for Summary Disposition in the above matter finding that Respondent, Pontiac School District (Employer), 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 found that Respondent did not breach its duty to bargain when, on February 12, 2013, it repudiated a February 5, 2013 written agreement with Charging Party, Pontiac Education Association, MEA/NEA (Union), which settled a grievance over the recall rights of certain employees. The ALJ found that the subject matter of the grievance settlement is a prohibited subject of bargaining under § 15(3)(j) of PERA and the parties' agreement is, therefore, unenforceable. For that reason, the ALJ concluded that Respondent's repudiation of the settlement did not violate its duty to bargain and recommended that we dismiss the charge. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

On November 7, 2013, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and requested oral argument. On November 15, 2013, Respondent filed its brief in support of the ALJ's decision.

In its exceptions, Charging Party argues that the ALJ erred by concluding that the Respondent's actions did not violate PERA when it repudiated the settlement agreement entered into with Charging Party on February 5, 2013. Charging Party also argues that the ALJ erred by ignoring the parties' June 6, 2008 Letter of Agreement, which addressed the manner in which vacant teaching positions should be filled.

After reviewing the exceptions and the briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, Charging Party's request for oral argument is denied. We also find Charging Party's exceptions to be without merit for the reasons stated below.

Factual Summary:

We agree with the ALJ that the material facts are not in dispute and, for the purpose of resolving the legal issue before us, adopt the facts as found by her. We repeat them in summary here. On June 6, 2008, the parties settled a grievance by entering into a letter of agreement over Respondent's use of long-term substitutes to fill vacant teaching positions instead of hiring teachers. The letter of agreement required Respondent to make every effort to hire only certified teachers to fill vacant positions and imposed limitations on Respondent's use of long-term substitutes. In 2012, Charging Party filed a grievance on behalf of several bargaining unit members contending that Respondent was violating the 2008 letter of agreement. The parties entered into a written settlement of the 2012 grievance on February 5, 2013. The settlement included declarations with respect to the recall rights of certain named grievants. On February 12, 2013, Respondent notified Charging Party of its withdrawal from the settlement agreement and that it was tendering back all consideration received pursuant to the settlement.

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:
>
> * * *
>
> (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.
>
> (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.

On exceptions, Charging Party argues that the ALJ erred by concluding that the Respondent's actions did not violate PERA when it repudiated the settlement agreement entered into with Charging Party on February 5, 2013. As the ALJ explained, the unilateral repudiation of a grievance settlement is generally unlawful. In affirming MERC's decision in *Oakland Univ*, 23 MPER 86 (2010), the Court of Appeals stated, "compromises that result in agreement provide stability to the parties' relationship and a degree of reliability to future interactions . . . . If settlements can be unilaterally revoked, both stability and the possibility of productive future discussions are undermined."[1] The parties' settlement agreement is just as binding as a new collective bargaining agreement would have been if it had been entered into on the same date and contained the same terms. It is undisputed that Respondent repudiated the February 5, 2013 settlement agreement.

The question here is whether that repudiation was a breach of Respondent's duty to bargain. The answer to that question depends on whether the terms of the parties' settlement agreement are binding. The February 5, 2013 settlement agreement acknowledges the recall rights of several teachers, makes the recall of one teacher effective immediately, and promises to recall four other teachers as soon as possible. For the reasons stated in the ALJ's decision, we find that the settlement agreement providing recall rights to designated individuals is an agreement regarding prohibited subjects of bargaining pursuant to § 15(3)(j) of PERA. The agreement to recall the teachers and place them in vacant positions is an agreement regarding teacher placement, which is an agreement that cannot lawfully be bargained under § 15(3)(j). As we explained in our recent decision in *Ionia Pub Sch*, 27 MPER ___ (Case No. C12 G-136, issued April 22, 2014), § 15(3)(j) gives public school employers broad discretion in making decisions regarding teacher placement and "evince[s] a legislative intent to make public school employers solely responsible" for such decisions.

Charging Party also argues that the ALJ erred by ignoring the parties' June 6, 2008 letter of agreement, which addressed the manner in which vacant teaching positions should be filled. However, in Charging Party's Brief in Support of Response in Opposition to Motion for Summary Disposition, Charging Party argues that Respondent "purposely obfuscates" the question before the ALJ by asserting that Charging Party has not alleged facts that would establish that the 2008 Letter of Agreement was violated. Charging Party then goes onto say, "[t]he Charge alleges a repudiation of the February 5, 2013 Settlement Agreement as evidenced by Pontiac's letter of February 12, 2013." In that same brief, Charging Party argues to the ALJ that Respondent's motion for summary disposition misses the issue when Respondent asserts that

[1] *American Ass'n of Univ Profs, Oakland Univ Chapter -and- Oakland Univ*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2012 (Docket No. 300680), 25 MPER 55 (2012), quoting *City of Roseville*, 23 MPER 55 (2010).

Charging Party failed to allege a violation of the letter of agreement within the six-month statute of limitations period. There, Charging Party argues:

> The Charge relates to the settlement of Grievance #14-11/12 . . . as well as the February 5, 2013 letter withdrawing the settlement for no apparent reason. . . . *The allegations contained in the Charge relating to the 2008 Letter of Understanding were included for clarity and background information.* The statute of limitations defense is not applicable in the present case because the Charge was filed February 21, 2013 and relating to events that took place on February 5, 2013 and February 12, 2013." (Emphasis added.)

Therefore, it is apparent from Charging Party's Brief in Support of Response in Opposition to Motion for Summary Disposition that Respondent's compliance with the 2008 letter of agreement is not an issue that Charging Party intended to address in the charge. Indeed, as Respondent pointed out, Charging Party did not allege sufficient facts to support a claim that the 2008 letter of agreement was repudiated. Moreover, Charging Party effectively waived this issue in its Brief in Support of Response in Opposition to Motion for Summary Disposition. Thus, we find no error in the ALJ's treatment of the 2008 letter of agreement.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, 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. The ALJ's Decision and Recommended Order is affirmed.

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 B. Yaw, Commission Member

Dated: May 21, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C13 B-033
Docket No. 13-000225-MERC

-and-

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

APPEARANCES:

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

Law Offices of Lee & Correll, by Michael K. Lee, for the Charging Party

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

On February 21, 2013, the Pontiac Education Association filed the above unfair labor practice charge with Michigan Employment Relations Commission (the Commission) against the Pontiac School District. The charge alleges that the Respondent violated §10(1)(a) and 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and MCL 423.210(1)(e). Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System.

The Unfair Labor Practice Charge and Motion for Summary Disposition:

Charging Party represents a bargaining unit consisting of teachers and instructional personnel employed by Respondent. The charge alleges that Respondent violated its duty to bargain in good faith under PERA when, on February 12, 2013, it repudiated a written grievance settlement enter into by the parties on February 5, 2013.[2]

[2] It was not clear from the charge, as filed, whether Charging Party was also alleging that Respondent committed an unfair labor practice by repudiating a 2008 letter of agreement between the parties, as discussed below. However, Charging Party's response to the motion for summary disposition states that the alleged unfair labor practice is the repudiation of the grievance settlement, and that the charge includes allegations relating to the letter of agreement only to provide background to the dispute.

Pursuant to my authority under Rule 165 of the Commission's General Rules, 2002 AACS R 423.165, on February 27, 2013, I issued an order to Respondent to show cause why it should not be found to have violated its duty to bargain by in good faith by repudiating this grievance settlement. On April 2, 2013, Respondent filed a response to the order to show cause and a motion for summary disposition under Rule 165. The motion asserts that the charge fails to state a claim upon which relief can be granted under PERA. In its response and motion, Respondent admits that it repudiated the February 5, 2013 settlement agreement. However, it maintains that its action was not an unfair labor practice because the subject of the settlement agreement was a prohibited subject of bargaining.

On April 19, 2013, Charging Party filed a response in opposition to the motion. In its response and brief, Charging Party asserts that it is not seeking to enforce a collective bargaining provision covering a prohibited subject of bargaining, but rather a binding grievance settlement agreement. It argues that Respondent violated its duty to bargain in good faith when it repudiated, for no apparent reason, a grievance settlement entered into by the parties in good faith. In a reply brief filed April 22, 2013, Respondent argues that Charging Party effectively admits that it engaged in unlawful bargaining regarding a prohibited subject of bargaining, obtained an agreement, and now seeks to enforce the agreement.

Based on facts set forth in the charge and pleadings and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

The facts below, except for the discussion of 2011 PA 102 and 2011 PA 103, are those alleged in the charge. The parties' pleadings reveal no significant differences in their account of events.

On June 6, 2008, the parties entered into a letter of agreement (LOA) resolving an existing grievance. The grievance concerned Respondent's use of long term substitutes to fill vacant teaching positions instead of hiring certified and highly qualified teachers. The letter of agreement stated that Respondent would make every effort to hire only certified and highly qualified teachers to fill all vacancies. It also stated, "In the event the District cannot fill the position with a highly qualified certified teacher, the District will not use a long term substitute unless they have proof that a valid substitute permit has been applied for and subsequently issued by the Michigan Department of Education." The letter of agreement provided, in addition, that Respondent would continue to provide Charging Party with copies of all job postings, that Charging Party would be given the names of all qualified candidates seeking teaching positions, and that Charging Party and the building principal would jointly appoint a teacher to observe, although not participate in, all interviews for teaching positions.

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.

(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.* [Emphasis added].

The section of the Michigan School Code referenced in §15(3)(k) of PERA, §1248, 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:

(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. [Emphasis added].

(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: [Emphasis added]
>
> . . .
>
> (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*.
>
> (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.* [Emphasis added]

As indicated above, the legislature did not prohibit a school district, after the expiration of a collective bargaining agreement, from adopting policies for recalling laid off teachers when filling vacancies arising after those teachers were laid off. It did place restrictions on a school district's discretion in deciding whom to recall. For example, a school district is prohibited from having a policy that makes length of service a factor in determining whom to recall, except as provided in §1248(1)(c).

Neither the charge nor the pleadings in this case indicate whether, in February 2013, there was a collective bargaining agreement in effect between the parties which had been effective before July 19, 2011. [3]

[3] According to facts asserted by the Charging Party in two previous unfair labor practice charges, but not in this charge, the parties' collective bargaining agreement expired on August 31, 2011. See decisions and recommended orders of the administrative law judge in *Pontiac Sch Dist,* Case No. C12 D-079/12-000690-MERC, issued December 11, 2012 and pending on exception before the Commission, and *Pontiac Sch Dist,* Case No. C12 D-070/ 12-000646-MERC, issued March 12, 2013, also pending on exceptions.

Sometime in the fall or winter of 2012, Charging Party filed a grievance asserting that Respondent was violating the terms of the 2008 LOA.

On February 5, 2013, the parties entered into a written settlement of this grievance. The settlement agreement read as follows:

> The District (PSD) acknowledges the recall rights of Grievants Kaee Johnson, Damon Johnson, Janet Marie Kuntz, and Janet McCasland. Their recall rights will be affected [sic] as soon as possible. The above mentioned grievants including Mr. LeFlore waive all rights to any back pay.
>
> Grievant David Leflore [sic] continues to have recall rights although there are no current vacancies for which he is qualified.
>
> If necessary, Grievant Tim Mohan continues to have recall rights and his recall will be effective immediately. Mr. Mohan also waives his right to back pay.

On February 12, 2013, Respondent's human resources director sent Charging Party this letter regarding the February 5 settlement agreement.

> Effective February 12, 2013, the Pontiac School District (PSD) hereby withdraws the settlement agreement reached in Grievance Number 14-11/12 (Attachment 1), In Michigan it is well-settled law that settlement agreements are binding until rescinded for cause [Case citation omitted]. Consistent with Michigan law, PSD has tendered back all consideration received under this agreement, thus returning both parties to the status quo. [Case citation omitted].
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> The letter did not specify what "cause" Respondent had to rescind the agreement.

Discussion and Conclusions of Law:

In *Oakland University*, 23 MPER 86 (2010), the Commission held that an employer's repudiation of a grievance settlement agreement violated §10(1)(e) of PERA. The Commission stated:

> We agree with well-settled law that unilaterally repudiating a prior agreement is unlawful and it makes no difference whether that agreement is a full collective bargaining agreement, a letter of understanding or, simply, a grievance settlement such as this. See *City of Roseville,* 23 MPER 5 (2010); *City of Detroit (Fire Dep't),* 18 MPER 39 (2005) (no exceptions); *Gibraltar Sch District*, 1995 MERC Lab Op 522. To allow one party to renege on a lawful agreement would negate the stability and reliability that is the goal of good faith bargaining. It is central to the stability of labor relations that such agreements be enforced, for if they can be unilaterally revoked, the stability and the possibility of future good faith bargaining is undermined. See *Kalamazoo Co & Kalamazoo Co Sheriff,* 22 MPER 94 (2009).

In other words, the Commission considers grievance settlements to have the same status as collective bargaining agreements; a party cannot repudiate a binding grievance settlement agreement without violating its duty to bargain in good faith under PERA any more than it can lawfully repudiate a binding collective bargaining agreement or significant provision thereof.

Respondent argues, however, that the February 5, 2013 grievance settlement agreement was not a binding agreement because its subject was "recall rights." As noted above, §15(3)(k) of PERA makes recall policies for teachers a prohibited subject of bargaining. As discussed in my decision and recommended order in *Pontiac Sch Dist*, C12 D-079/12-000690-MERC, pending on exceptions, §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.

I also conclude that §15(3)(j) should be broadly interpreted to make all decisions over teacher placement prohibited subjects of bargaining. See discussion in my decision and recommended order in *Pontiac Sch Dist*, C12 D-070/12-000646-MERC, pending on exceptions.

The term "prohibited bargaining subject" was introduced to PERA by amendments to §15 made by 1994 PA 112. In *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996), the Court of Appeals construed this phrase to be synonymous with "illegal subject of bargaining," a concept first developed under the National Labor Relations Act (NLRA), 29 USC 150 et seq. The Court in *Michigan State AFL-CIO* stated, at 486-487, that like an "illegal" subject of bargaining under PERA, parties were not foreclosed from discussing a "prohibited topic." However, the Court concluded that the legislature's intent was to foreclose the possibility that a school district could be found to have committed an unfair labor practice by refusing to bargain over a prohibited topic, or that a prohibited topic could become part of a collective bargaining agreement. With respect to the latter point, the Court quoted *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54 (1974), that a "contract provision embodying an illegal subject of bargaining is … unenforceable."

I find no basis for drawing a distinction between a provision in a grievance settlement agreement and a contract provision in an otherwise binding collective bargaining agreement. I find that an agreement embodying a prohibited subject of bargaining is an unenforceable agreement under *Michigan State AFL-CIO* whether that agreement is in the form of a grievance settlement or a contract provision. I also conclude that a public employer district cannot be found to have committed an unfair labor practice by repudiating a grievance settlement agreement on prohibited topic, even if the employer entered into that settlement agreement after that topic had become a prohibited subject and the employer either knew or should have known that the agreement it had just signed would be unenforceable.

In the instant case, the grievance that gave rise to the February 5, 2013 settlement agreement was a grievance over Respondent's alleged failure to hire highly qualified teachers to fill vacancies. Had the parties merely agreed that Respondent would hire teachers to fill these vacancies instead of using long-term substitutes, the settlement agreement would not have

constituted an agreement on a prohibited subject of bargaining. However, the February 5 agreement commits Respondent to place particular individuals in vacant positions, including positions vacant at the time of the agreement and positions to become vacant in the future. I find that the February 5, 2013 settlement agreement is an agreement on a prohibited subject, teacher placement. I conclude, therefore, that Respondent did not violate its duty to bargain under PERA when it repudiated that agreement. For that reason, I recommend that the Commission issue the order below.

The February 5, 2013 grievance settlement also commits Respondent to recognizing the "recall rights" of certain teachers. Section 15(3)(k) of PERA incorporates by reference §1248 of the School Code, and §1248(2) appears to recognize the responsibility of a school district with a collective bargaining agreement in effect at the time this language was added to the School Code to continue to adhere to the layoff and recall provisions in that agreement. After that collective bargaining expires, however, the school district has no duty under PERA to maintain the recall practices established by that agreement because they are no longer "terms and conditions" of employment under §15(1) of PERA. Moreover, a school district may violate the School Code if its recall practices/policies are not in compliance with §1248. In this case, the record does not reflect whether a collective bargaining agreement entered into by the parties before July 19, 2011 was still in effect on February 12, 2013 when Respondent repudiated the grievance settlement. However, since I have concluded that the February 5, 2013 grievance settlement was an agreement on a topic made prohibited by §15(3)(j) of PERA, it is not necessary for me to decide whether it was also an agreement on a topic made prohibited by §15(3)(k).

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 18, 2013