STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CALHOUN INTERMEDIATE EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

Case No. CU12 B-009

-and-

CALHOUN INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young and Chiodini, P.C., by Jeffrey S. Donahue, for the Respondent

Thrun Law Firm, P.C., by Kevin S. Harty, for the Charging Party

DECISION AND ORDER

On August 24, 2012, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, Calhoun Intermediate Education Association, MEA/NEA (Union), violated § 10(3)(c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(3)(c). The ALJ concluded that the Union insisted, as a condition of its agreement to a successor collective bargaining agreement, that the Employer agree to provisions on prohibited subjects of bargaining. The ALJ further found that the Union obstructed and impeded the bargaining process by continuing to make proposals dealing with prohibited subjects after the Employer unequivocally refused to bargain over those proposals. The ALJ found that by so doing, Respondent violated its duty to bargain in good faith and recommended that the Commission issue an order requiring the Union to cease and desist from these unlawful actions. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

On September 17, 2012, the Union filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. After requesting and receiving an extension of time to file its response to the exceptions, the Employer filed cross exceptions to the ALJ's Decision and Recommended Order, a brief in support of

the cross exceptions, and a request for oral argument on October 22, 2012. The Union filed a brief in opposition to Charging Party's cross-exceptions on October 29, 2012.

In its exceptions, the Union contends the ALJ erred in: (1) finding that it insisted, as a condition of its agreement on a contract, that the Employer agree to include prohibited subjects of bargaining; (2) finding that the Union insisted on the inclusion of prohibited subjects and effectively created an impasse; and (3) concluding that, by continuing to insist on proposals regarding prohibited subjects after the Employer unequivocally refused to discuss them, the Union impeded the bargaining process. In its cross exceptions, the Employer contends the ALJ erred in finding that, by submitting a package proposal, the Union was not insisting as a condition of agreement that the Employer accept the entire package as submitted. In response to the Employer's cross exceptions, the Union contends that once the parties began removing individual items from the package and tentatively agreeing on them, the package no longer remained. The Union argues that it did not insist that the Employer accept the entire package as a condition of agreement.

After reviewing the exceptions, cross exceptions, and the briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the Employer's request for oral argument is denied. After reviewing the record carefully and thoroughly, we find both the Union's exceptions and Employer's cross exceptions to be without merit.

Factual Summary:

The material facts in this matter are not disputed and are set forth fully in the ALJ's Decision and Recommended Order. We adopt the facts as found by the ALJ and will not repeat them here except as necessary.

The Union represents a bargaining unit of teachers and other professionals employed by Charging Party. The parties' most recent collective bargaining agreement, which covered 2009 through 2011, expired June 30, 2011. The 2009-2011 contract contains terms that: in Article 4, gave first consideration to bargaining unit members when filling vacancies; in Article 5, governed employee evaluation procedures, including the steps to be followed if an employee was identified as unsatisfactory or needing improvement; in Article 6, required that there be just cause for any discharge, demotion, or other involuntary change in an employee's employment status; and, in Article 7, established layoff and recall procedures, set out the order in which employees were to be laid off, and required employees to be recalled in order of seniority. These terms were the subject of dispute in the parties' efforts to negotiate a successor agreement.

The parties commenced negotiations for a new collective bargaining agreement on May 25, 2011. At that meeting, the Employer made an initial proposal that made some changes to Article 5 of the expiring contract but otherwise preserved the language of Articles 4 through 7 as it appeared in the 2009-2011 contract. The parties met to

bargain twice more before the Legislature enacted 2011 PA 103, which went into effect on July 19, 2011. Act 103 amended § 15(3) of PERA by adding subsections 15(3)(j) - (p), which made certain matters prohibited subjects of bargaining for public school employers and the unions representing school employees. It is undisputed that Subsections 15(3)(j) - (n) affected the enforceability of certain provisions in Articles 4 through 7 from the 2009-2011 collective bargaining agreement. Subsections 15(3)(j) - (n) 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 the placement of teachers, 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 reduction in force or any other personnel determination resulting in the elimination of a position or a recall from a reduction in force or any other personnel determination resulting in the elimination of a position or in hiring after a reduction in force 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.
>
> (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.
>
> (m) For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191,

> decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101.
>
> (n) Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 (Ex Sess) PA 4, MCL 38.83a, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

On August 15, 2011, the Employer gave the Union a revised comprehensive proposal. The revised proposal limited the applicability of certain language in Articles 4 through 7 to "non-tenured employees" and "probationary employees (other than probationary employees who are teachers)." The employer also added language to the proposal indicating that it would not "enter into or execute any successor collective bargaining agreement to the 2009-2011 Master Agreement which contains provisions embodying or prepared pertaining to any prohibited subject of bargaining, as are more particularly set forth in Section 15(3) of the Public Employment Relations Act." The Union interpreted the Employer's position as a refusal to enter into a successor collective bargaining agreement unless the provisions from the expired contract that now covered prohibited subjects of bargaining were removed. The Union responded by informing the Employer that changes to the language from the expired contract that covered newly prohibited subjects of bargaining would involve bargaining over those subjects and the Union would not bargain over prohibited subjects. The Union also informed the Employer that any provision in the successor contract on a prohibited topic would be unenforceable. The Union maintained that, consequently, those provisions could remain in the contract. The Union also suggested that provisions covering prohibited topics be transferred to an appendix attached to the agreement, but the Employer rejected the Union's suggestion.

On September 6, 2011, the Union gave the Employer a "package" proposal, which provided that the successor agreement would retain the language in Articles 4 through 7 of the expired contract.

On October 3, 2011, both parties presented proposals that consisted of changes each proposed to make to the language of the 2009-2011 agreement. The Employer's October 3 proposal continued to maintain that it would not enter into a successor collective bargaining agreement containing provisions pertaining to any prohibited subject of bargaining and restricted the applicability of certain provisions in Articles 4 through 7 to non-teaching employees. The Union's October 3 proposal was labeled a "package" proposal and included a proposed letter of agreement (LOA). The proposed LOA provided that language governing prohibited subjects of bargaining had been removed from the contract and was included in the LOA as an appendix. The LOA further provided that if Act 103 was found to be legally invalid, was repealed, or was modified by the legislature, the language included in the LOA would be returned to the contract. When the Employer rejected the proposed LOA, the Union withdrew its October 3 package proposal.

After the October 3 bargaining session, the Union requested mediation through the Commission. The first mediation session was held on November 7, 2011, and the parties were able to reach tentative agreements on a number of issues both before and during the mediation session.

On December 9, 2011, the Employer gave the Union another comprehensive proposal. The proposal continued to advise the Union that the Employer would not enter into a successor contract that contained any language addressing prohibited subjects of bargaining. The Employer further cautioned the Union that it would consider the Union's maintenance or presentation of proposals embodying prohibited subjects of bargaining to be a violation of the duty to bargain in good faith.

The parties again met with the mediator on January 9, 2012. During the mediation session, despite the Employer's warning that Union proposals for prohibited subjects of bargaining would be regarded as a violation of the Union's obligation to bargain in good faith, the Union presented another "package" proposal in which it proposed to continue the language of Articles 4 through 7 of the expired contract without change. Nevertheless, the parties reached tentative agreement on at least one additional issue.

On January 18, 2012, Michigan Education Association General Counsel Arthur Przybylowicz appeared before the Employer's Board of Education and requested the Board to carry over the language from the expired agreement concerning prohibited subjects of bargaining to any successor agreement.

On January 24, 2012, the Employer sent the Union another comprehensive proposal that incorporated the parties' tentative agreements on contract language, and again put the Union on notice that the Employer would not enter into a successor contract that contained any language addressing prohibited subjects of bargaining. The language regarding Articles 4 through 7 was the same as that set forth in the Employer's December 9 proposal.

Although the parties again met with a mediator on February 9, 2012, neither party had a new proposal to present. At the conclusion of the meeting, the Union informed the Employer that it was filing a petition for fact finding. Later that day, the Union filed a fact finding petition, which listed the issues not yet resolved by the parties as: "wages, insurance, sick leave, recognition clause, and duration of agreement."

On February 29, 2012, shortly after the instant charge was filed, the Union presented another "package" proposal to the Employer. Again, the Union proposed to continue the language of Articles 4 through 7 of the expired agreement without change.

Discussion and Conclusions of Law:

Once the matters covered by Articles 4 through 7 of the parties' expired collective bargaining agreement were made prohibited subjects of bargaining by the passage of Act 103, the Employer informed the Union that it would not agree to including such matters in a successor collective bargaining agreement. Nevertheless, the Union persisted in requesting that the language of Articles 4 through 7 be maintained despite its inclusion of prohibited subjects of bargaining. After receiving two proposals from the Union proposing that prohibited subjects of bargaining be included in the successor contract, the Employer cautioned the Union that continued insistence on the inclusion of prohibited subjects of bargaining in the contract would be viewed as a breach of the duty to bargain in good faith. Despite that warning, the Union persisted in demanding that provisions regarding prohibited subjects of bargaining that had been in Articles 4 through 7 of the expired contract also be included in the successor agreement. These facts support the ALJ's conclusion that the Respondent violated its duty to bargain in good faith by insisting as a condition of agreement on a contract, that the Employer agree to provisions on prohibited topics. We agree with the ALJ's findings for the reasons stated in her decision.

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*. In *Ionia Pub Sch*, 27 MPER 55 (2014) we found that same legislative intent to be present in the additions to § 15(3) made by 2011 PA 103.

The Respondent argues in its brief on exceptions that the Michigan Supreme Court, in *Michigan State AFL-CIO v MERC*, 453 Mich 362 (1996), "implicitly rejected" the Court of Appeals' finding that the Legislature intended to prohibit these subjects from becoming part of a collective bargaining agreement. This Commission finds no such rejection, implicit or otherwise. Contrary to Respondent's contention, the Supreme Court

noted that the Legislature removed the statutory requirement that public school employers listen to their employees regarding these subjects and instructed the employers not to collectively bargain with regard to these subjects. The Court stated, *id*. at 380:

> Subsections 15(3) and (4) prohibit collective bargaining over nine subjects. Plaintiffs argue that by denying collective bargaining these subsections actually impinge on public school employees' freedom of speech. If these subsections denied public school employees the right to voice their concerns over these nine subjects, they would violate the First Amendment. *City of Madison v Wisconsin Employment Relations Comm*, 429 US 167, 97 S Ct 421, 50 L Ed 2d 376 (1976). However, nothing in the subsections prohibits discussion.
>
> Instead, they prohibit public school employers from collectively bargaining over these subjects with their employees. Collective bargaining as a process requires both parties to confer in good faith-to listen to each other. MCL § 423.215(1); MSA § 17.455(15)(1). The First Amendment does not. *Smith v Arkansas State Hwy Employees*, *supra* 441 US at 465, 99 S Ct. at 1828. In these subsections, the Legislature simply has removed the statutory requirement that public school employers listen to their employees and instructed the employers not to collectively bargain with regard to these subjects.

The Court thus concluded that, in using the term "prohibited subjects," the Legislature intended to make such matters illegal subjects of bargaining. Further, the Court explained that under § 15, a school district and a union are not forbidden from discussing these matters. Rather, a school district can never be found to have committed an unfair labor practice by refusing to bargain over them, and these matters can never become part of a collective bargaining agreement. Compliance with the statutory requirement of collective bargaining, therefore, cannot be made dependent upon the acceptance of provisions in an agreement which, by their terms, are forbidden by PERA's specific language.

On exceptions, Respondent contends that it did not insist as a condition of agreement that the Employer agree to provisions on prohibited topics. Contrary to Respondent's contention, however, the record establishes that the Employer notified the Union, on August 15, 2011, that it would not enter into any successor collective bargaining agreement that contained provisions pertaining to any prohibited subject of bargaining. Subsequently, the Union repeatedly attempted to get the Employer to agree to include provisions covering prohibited topics in the successor agreement. On December 9, 2011, the Employer cautioned the Union that it would consider further Union proposals regarding prohibited subjects of bargaining to be a violation of the Union's obligation to bargain in good faith. Nevertheless, after that point the Union repeatedly attempted to get the Employer to collectively bargain with regard to prohibited subjects. Therefore, we agree that the Union's persistence in demanding bargaining over

prohibited subjects as a condition of reaching a successor agreement is indicative of bad faith.

The Union contends that its conduct was proper because these provisions would be unenforceable, and therefore harmless. We disagree. Inclusion of the provisions in a successor agreement could not be accomplished in the absence of collective bargaining. It is simply not possible to reach a collective bargaining agreement which encompasses a prohibited subject of bargaining without engaging in bargaining over the subject, an act that the law instructs public school employers not to perform. By continuing to insist, as a condition of agreement, that the Employer agree to prohibited topics in the contract, the Union acted improperly and violated its duty to bargain in good faith. Respondent contends that it wanted to leave those provisions in the contract in case Act 103 was repealed or otherwise invalidated. However, that does not justify including language that is not now and may never be enforceable. Including such language in the collective bargaining agreement is likely to cause considerable confusion for employees covered by the contract as well as for school administrators and union officials who must interpret and apply the contract. Moreover, Act 103 was enacted with 2011 PA 101 and 2011 PA 102, which changed public school employers' responsibilities in areas over which Act 103 prohibits bargaining. Act 101, MCL 38.81-83b, 38.91, 38.93, and 38.104, amended the Teachers' Tenure Act, 1937 PA 4, MCL 38.71 – 38.191. Act 102, MCL 380.1248-380.1249a, amended the Revised School Code, 1976 PA 451, MCL 380.1 -380.1853. Act 101 and Act 102 direct public school employers to take actions that are inconsistent with the language of Articles 4 through 7 of the parties' expired collective bargaining agreement. Therefore, even if Act 103 were repealed, but Acts 101 and 102 were not, the Employer would still be prohibited by those statutes from complying with language in Articles 4 through 7.

Although the Respondent has also argued that it did not violate its duty to bargain because it did not insist on the inclusion of the prohibited topics in the agreement to the point of impasse, the Commission agrees with the ALJ that Respondent violated its duty to bargain in good faith even if its conduct did not produce an impasse. As noted by the ALJ, "a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences."[1] To determine whether a party has bargained in good faith, we examine the totality of the circumstances to decide whether a party has approached the bargaining process with an open mind and a sincere desire to reach an agreement. *Grand Rapids Pub Museum*, 17 MPER 58 (2004)*; City of Springfield*, 1999 MERC Lab Op 399, 403; *Unionville-Sebewaing Area Sch*, 1988 MERC Lab Op 86; *Kalamazoo Pub Sch*, 1977 MERC Lab Op 771, 776. In the present case, the record establishes that the Union continued to insist, as a condition of its agreement on a successor to the 2009-2011 collective bargaining agreement, that the Employer agree to include provisions on prohibited bargaining subjects. As a result of the Union's continued insistence on including the prohibited subjects in its bargaining proposals, the Employer was unable to assess whether the position the Union took on other issues was sincere or merely an attempt to urge the Employer to bargain over the prohibited topics. The Union's conduct

[1] Quoting *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475, 478, (1967).

obstructed and impeded the bargaining process and made resolution of the parties' dispute more difficult than it otherwise would be.

In its cross-exceptions, the Employer contends that the ALJ erred in finding that, by submitting a package proposal, the Union was not insisting as a condition of agreement that the Employer accept the entire package as submitted. Although submission of a package proposal usually indicates that the party to whom the proposal is submitted must either accept or reject the proposal in its entirety, the record in the present case establishes that, notwithstanding the title of the proposals, the parties were able to reach tentative agreements on several issues. Consequently, the Commission agrees with the ALJ that the package proposals themselves do not establish that the Union was insisting that the Employer either accept or reject the entire package as submitted.

In conclusion, we agree with the ALJ that the Union violated its duty to bargain in good faith by unlawfully insisting as a condition of agreement that the Employer agree to include provisions on prohibited topics in the contract. We further agree with the ALJ that the Union violated its duty to bargain in good faith, and obstructed and impeded the bargaining process, by continuing to make proposals dealing with prohibited subjects after the Employer unequivocally refused to bargain over these proposals. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, the ALJ's decision is affirmed.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: September 15, 2014

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CALHOUN INTERMEDIATE EDUCATION ASSOCIATION, MEA/NEA,** TO HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL NOT insist as a condition of our agreement on a successor to our 2009-2011 collective bargaining agreement with the Calhoun Immediate School District that the School District agree to include provisions on prohibited bargaining subjects in this agreement.

WE WILL NOT bargain in bad faith, and obstruct and impede the bargaining process, by continuing to make proposals at the bargaining table dealing with prohibited subjects after the School District has unequivocally refused to bargain over these proposals.

WE WILL withdraw any outstanding bargaining proposals dealing with prohibited subjects.

CALHOUN INTERMEDIATE EDUCATION ASSOCIATION, MEA/NEA

By: _____

Title: _____

Date: _____

Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. CU12 B-009

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CALHOUN INTERMEDIATE EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

Case No. CU12 B-009
Docket No. 12-000185

CALHOUN INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young and Chiodini, P.C., by Jeffrey S. Donahue, for Respondent

Thrun Law Firm, P.C., by Kevin S. Harty, for Charging Party

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

On February 21, 2012, the Calhoun Intermediate School District filed the above charge with the Michigan Employment Relations Commission (the Commission) against the Calhoun Intermediate Education Association. The charge was amended on April 19, 2012. The Respondent Union represents a bargaining unit of employees of the Charging Party Employer that includes teachers. The charge alleges that the Union violated its duty to bargain in good faith under §10(3)(c) of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210(3)(c) during the parties' negotiations for a successor to a collective bargaining agreement which expired on June 30, 2011. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System.

On April 26, 2012, the Employer filed a motion for summary disposition. Attached to the motion were an affidavit executed by Employer Assistant Superintendent for Human Resources Larry Yarger, a member of the Employer's bargaining team, and copies of the parties' expired agreement and written bargaining proposals made by the parties between August 15, 2011 and February 29, 2012. The motion asserts that there are no material facts in dispute and that the Employer is entitled to judgment as a matter of law.

On May 21, 2012, the Union filed a response to the motion. Included with the response was an affidavit executed by Union UniServ Director Tara Wilbur, the Union's chief negotiator,

and a copy of a bargaining proposal made by the Employer on May 25, 2011. The Union asserts that while the bargaining proposals speak for themselves, the Employer mischaracterizes these proposals in its charge and motion. It denies that there are no materially disputed facts. The Union asks that the Employer's motion be denied and that the matter be set for hearing or, in the alternative, that the charge be dismissed.

At the request of both parties, I held oral argument on the motion on May 29, 2012. After review of the pleadings filed by both parties, I conclude that there are no material facts in dispute. Based on facts not in dispute as set forth below, and the arguments made in the pleadings and at oral argument, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Effective July 19, 2011, the Legislature amended §15 of PERA to make certain topics previously considered mandatory subjects of bargaining "prohibited subjects of bargaining." The Employer alleges that on and after September 6, 2011 the Union violated its duty to bargain by continuing to propose, over the Employer's clear and explicit objection, that the parties' new contract include provisions from the expired agreement covering now-prohibited subjects. It asserts that the Union's insistence on the retention of provisions pertaining to prohibited subjects has obstructed and impeded the bargaining process. It also alleges that the Union has effectively created a bargaining impasse by insisting on the retention of these provisions and by linking them with mandatory subjects in "package" proposals. The Employer asserts, in addition, that the Union has bargained in bad faith by seeking recourse to mediation and fact finding while continuing to insist on provisions dealing with prohibited topics. Finally, the Employer alleges that the Union has bargained in bad faith by proposing a duration clause for the new contract which is illegal under §15(b) of PERA and by continuing to insist on that proposal in mediation and fact finding.

Facts:

The Union represents a bargaining unit of the Employer's employees that includes "teachers" as that term is used in the Michigan Revised School Code and the Teacher Tenure Act, MCL 38.71 et seq. This bargaining unit also includes other professional employees, including school social workers, school psychologists, and occupational therapists. The parties agree that these employees are not "teachers" as that term is used in these statutes and in PERA.

The parties' most recent collective bargaining agreement covered the term 2009-2011 and expired on June 30, 2011. The 2009-2011 agreement recognized three classifications of employees: "Tenure" employees, defined as certificated employees holding assignments for which certification is required who have completed the probationary period required by the Tenure Act and have not been denied tenure; "Non-tenure" employees, defined as employees who are not eligible for tenure status according to the provision of the Tenure Act but who hold state approval or state authorization appropriate to their assignment and who have at least four years of experience in the District; and "Probationary employees" defined as all remaining employees.

The parties began negotiations for a successor collective bargaining agreement on May 25, 2011. At the parties' first meeting, the Employer presented an initial proposal consisting of the changes it proposed to make to the language of the prior agreement. The cover page of this proposal included this paragraph:

> The Board of Education reserves the right to make additional proposals as well as the right to alter or modify any of the proposals contained therein. Nothing contained in these proposals shall be construed to be a waiver of or acknowledgement that any Board rights or prerogatives may not presently exist nor shall any modifications or withdrawal of a proposal lessen or detract from Board rights or prerogatives as they may presently exist. Nothing contained herein identifying removal of a provision constituting a prohibited or unlawful subject of bargaining from the expiring collective bargaining agreement shall be regarded as a bargaining proposal or as a waiver of the Board's statutory rights with respect to those matter(s), as referenced in §15 of the Public Employment Relations Act. Unless otherwise indicated in this proposal, the Board of Education proposes that the provisions of the 2009-2011 Master Agreement be continued in the successor contract. This proposal is made on the basis of present and anticipated fiscal and operating conditions. The Board reserves the right to amend, modify or withdraw any component of this proposal based on a change in those conditions or in response to any statutory revisions that occur and which pertain to any of the matters addressed herein.

The parties met and bargained again on July 7 and July 18, 2011.

On July 19, 2011, the Legislature gave immediate effect to amendments to §15 of PERA making certain topics prohibited subjects of bargaining for public school employers and the unions representing their "teachers." Under this statute, 2011 PA 103, the following became prohibited topics:

> 1. Any decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee or the bargaining unit. (§15(3)(j) of PERA)
>
> 2. Decisions regarding the layoff and recall of teachers and the impact of those decisions.[2]

[2] Section 15(3)(k) of PERA makes the following prohibited subjects of bargaining:

> Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies 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 1380, 1248, any decision made by the public school

3. Decisions regarding teacher evaluation systems under the provisions of Section 1249 of the Revised School Code, MCL 380.1249, as well as the impact of those decisions.[3]

4. Decisions about classroom observations or the impact of those decisions.[4]

5. Discipline and discharge decisions involving employees covered by the Teacher Tenure Act.[5]

6. Decisions pertaining to merit pay for teachers.[6]

There is no dispute that the parties' 2009-2011 collective bargaining agreement included provisions covering topics one through five above, and that these provisions applied both to teachers and non-teachers. Article 4 of that agreement required vacancies to be filled through the recall of laid off unit members, if possible, required the posting of other vacancies, and afforded

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employer pursuant to those policies, or the impact on those decision on an individual employee or the bargaining unit.

[3] Section 15(3)(l) makes the following 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 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.

[4] Section 15(3)(n) makes the following prohibited subjects of bargaining:

> Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 PA 4, MCL 38.831, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

[5] Section 15(3)(m) makes the following prohibited subjects of bargaining:

> For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of any employee, decision concerning the discharge or discipline of an individual employee, or the impact of those decision on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of any employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 PA 4, MCL 38.101.

[6] Section 15(3)(o) makes the following prohibited subjects of bargaining:

> Decisions about the development, content, standards, procedures, adoption, and implementation of the method of compensation required under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions about how an employee performance evaluation is used to determine performance-based compensation under section 1250 of the revised school code, 1976 PA 451, MC L 380.1250, decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

first consideration in filling these vacancies to bargaining unit members. Article 5 governed evaluation procedures, including the minimum number and length of classroom observations preceding the evaluation and the steps to be followed if an employee was identified as unsatisfactory or needing improvement. Article 6 required all discharges, demotions or other involuntary changes in employment status to be for just cause. Article 7 covered layoff and recall, required probationary employees to be laid off first, set out the order of layoff, and required employees to be recalled in order of seniority if qualified.

Except for some changes to Article 5, the Employer's May 25, 2011 proposal preserved the language of Articles 4 through 7 as it was in the 2009-2011 agreement. At a bargaining session held on August 15, 2011, the Employer gave the Union a revised comprehensive bargaining proposal which, unlike its May 25 proposal, restricted the applicability of certain provisions in Articles 4 through 7 to "non-tenure employees" and "probationary employees (other than probationary employees who are teachers)." In addition, the Employer added to the following paragraph to the cover language of its August 15 proposal:

> Nothing in this proposal should be regarded as indicating that the Board of Education proposes or otherwise intends to continue any provisions of the 2009-2011 Master Agreement which pertain to prohibited subjects of bargaining in the successor collective bargaining agreement, to the extent that such provisions pertain to prohibited subjects of bargaining. *Further, the Calhoun Intermediate Education Association is hereby also notified that the Board of Education will not enter into or execute any successor collective bargaining agreement to the 2009-2011 Master Agreement which contains provisions embodying or pertaining to any prohibited subject of bargaining, as are more particularly set forth in Section 15(3) of the Public Employment Relations Act.* This counterproposal includes all tentative agreements reached during bargaining for a successor contract for the 2009-2011 Master Agreement, with the exception of those tentative agreements that pertain to those matters that have become prohibited subjects of bargaining due to recent amendments to Section 15 of the Public Employment Relations Act. [Emphasis added]

According to Union chief negotiator Wilbur, the Union interpreted the above statement as a refusal by the Employer to enter into any successor collective bargaining agreement unless provisions on newly-made prohibited topics were removed. At the August 15 bargaining session, the Union told the Employer that it was the Union's position that the removal or alteration of any language covering prohibited topics would involve bargaining over these topics, and that the Union would not bargain over prohibited topics. The Union also said that any provision in the successor contract on a prohibited topic would be unenforceable, and, for that reason, could remain in the contract. The Union suggested that provisions covering prohibited topics be transferred from the body of the contract to an appendix attached to the agreement in the form of a letter of agreement which would state that the provisions would be transferred back to the body of agreement if 2011 PA 103 was changed or overturned. The Employer rejected this suggestion.

The Employer's August 12 proposal contained a duration clause that stated that the agreement would be effective upon ratification and expire on June 30, 2012.

On September 6, 2011, the Union gave the Employer a comprehensive proposal which, like the Employer's proposals, consisted of the changes it proposed to make to the 2009-2011 agreement. The proposal was labeled a "package" proposal. The cover of the proposal stated, "Unless otherwise specified in this or subsequent proposals, the terms of the 2009-2011 Agreement are proposed to be continued in the successor collective bargaining agreement." The September 6 Union proposal contained no changes to Articles 4, 5, 6 or 7 of the expired contract, i.e., the Union proposed that the successor agreement carry over the language of those articles without change. During the September 6 meeting, Wilbur asked the Employer's chief negotiator why the Employer was insisting on removing language which would be unenforceable. The chief negotiator said that the Employer would gain more bargaining power in future contract negotiations, or words to that effect.

The duration clause in the Union's September 6 proposal stated that the agreement would be effective on an as-yet unspecified dated in 2011 and remain in effect until December 31, 2014.

On October 3, 2011, both parties presented comprehensive proposals that consisted of changes each proposed to make to the language of the 2009-2011 agreement. The Employer's October 3 proposal contained the same language on its cover page as its August 15 proposal. The Employer's October 3 proposal restricted the applicability of certain provisions in Articles 4 through 7 in the same way as its August 15 proposal. The duration provision in the Employer's October 3 proposal was also the same as in its August 15 proposal.

The Union's October 3 proposal included the same cover page language as its September 6 proposal, i.e. the proposal stated that unless otherwise specified, the terms of the expired agreement were proposed to be continued in the successor agreement. The October 3 proposal was also labeled a "package" proposal. The proposed duration clause was also the same as that in the Union's September 6 proposal, except that it proposed an expiration date of December 31, 2013 instead of 2014. The Union's October 3 proposal recognized, in the body of the proposed contract, a distinction between "teachers," probationary or otherwise, and "non-tenure employees." However, it included a proposed letter of agreement (LOA) to be attached as an appendix to the contract. The proposed LOA stated that language relating to prohibited subjects of bargaining as set out in §§15(3)(j)-(o) of PERA had been omitted from the collective bargaining agreement as a result of the enactment of 2011 PA 103, and that the language removed or modified was appended to the LOA. The LOA also stated:

> In the event that an appellant court of competent jurisdiction declares all or part of Public Act 103 to be unconstitutional or otherwise legally invalid, or all or part of such Public Act is repealed or modified by the Michigan Legislature and such legislative amendments are signed by the Governor, then the parties agree that the language encompassed in this LOA as Exhibit A shall be returned to the CBA.

The Union withdrew its proposal during the October 3 bargaining session after the Employer rejected it.

After the October 3 bargaining session, the Union requested the assistance of a Commission mediator. The parties met with the mediator on November 7. Prior to that meeting, the parties had reached tentative agreements on a number of contract provisions. The parties reached other tentative agreements during the November 7 mediation session.

On December 9, 2011, the Employer sent the Union another comprehensive proposal. The December 9 proposal included the cover language from the Employer's August 12 and October 6 proposals, although the final sentence of the cover language now read, "This counterproposal includes all tentative agreements reached during bargaining for a successor contract for the 2009-2011 Master Agreement." The Employer's December 9 proposal restricted the applicability of certain provisions in Articles 4 through 7 in the same manner as its August 15 and October 3 proposals. It also proposed that the agreement be effective upon ratification and remain in effect until June 30, 2012. The Employer's proposal was accompanied by a letter to Wilbur from the Employer's chief negotiator indicating that the December 9 proposal replaced the Employer's October 3 proposal. This letter also contained the following paragraph:

> When the parties last met across the bargaining table (i.e., on October 3, 2011), the Association withdrew a package proposal it made to the Board of Education on that date. Given that development, it is CISD's understanding that the CIEA's package proposal of September 6, 2011 represents the current position of the CIEA on all unresolved issues. As has been previously conveyed to the Association, CISD objects to the Association's attempts to include language pertaining to prohibited subjects of bargaining in the contract that is now being negotiated. The Association's position in this regard is particularly problematic as it has now invoked the mediation process through the Michigan Employment Relations Commission. The maintenance or presentation of any proposals by the COEA which embody prohibited subjects of bargaining will be regarded by Calhoun Intermediate School District as a violation of the Association's obligation to bargain in good faith.

The parties met with the mediator a second time on January 9, 2012. During this mediation session, the Union presented another written proposal. Like the Union's earlier proposals, the Union's January 9 proposal was labeled a "package proposal." Like its proposals prior to October 3, the Union's January 9 proposal proposed to continue the language from Articles 4, 5, 6 and 7 of the expired agreement without change. The January 9 proposal, however, contained a new duration clause provision, which read as follows:

> The provisions of this Agreement will be effective _____ 2011, and will continue and remain in effect until December 13, 2013. It is the intent of the parties to reach a successor agreement before December 31, 2013. However, if a successor agreement cannot be reached before December 31, 2013, all provisions of the 2011-2013 Master Agreement will remain in full force and effect until such time as negotiations succeed in establishing a successor agreement.

The parties reached tentative agreement on at least one additional contract provision at the January 9 mediation session. There is no indication in the pleadings that there was any discussion of the Union's new duration clause proposal during that mediation session.

On January 18, Arthur Przybylowicz, general counsel for the Michigan Education Association, appeared at a meeting of the Employer's Board of Education to urge that it agree to carry over the language from the expired agreement concerning prohibited subjects to the successor agreement. Przybylowicz stated at the meeting that this language would be unenforceable.

On January 24, 2012, the Employer sent the Union another comprehensive proposal. The cover language and proposals on Articles 4 through 7 were the same as in the Employer's December 9 proposal. The duration clause was also the same, except that the Employer now proposed that the agreement expire on June 30, 2013. The Employer's January 24 proposal incorporated the tentative agreements reached by the parties on contract language.

The parties met with a mediator a third time on February 9, 2012. Neither party had a new proposal to present at this meeting. At the conclusion of the mediation session, the Union announced that it was filing a petition for fact finding with the Commission, and filed the petition that same day. On the petition, the Union listed "wages, insurance, sick leave, recognition clause and duration of agreement" as unresolved issues.

The Union presented another proposal, again labeled as a package proposal, on February 29, 2012. The proposal included the continuation of the language in Articles 4-7 of the expired contract and the duration clause first proposed by the Union on January 9.

The proposals of both parties, including the Union's February 29, 2012 proposal and the Employer's January 24, 2012 proposal, include salary schedules that provide for automatic salary increases based on increased experience and increased educational attainment. Article 10 of the Union's February 29 proposal requires the Employer to pay the premiums for the types of insurance listed in the agreement, less specific sums to be contributed by the employees. The Employer's January 24 proposal makes full-time employees responsible, effective March 1, 2012, for 20% percent of the premiums, and, depending on the size of the increase in the premiums after July 1, 2012, for up to 25% of the premium thereafter.

Discussion and Conclusions of Law:

Proposals Dealing with Prohibited Subjects of Bargaining

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:

> Generally subjects of collective bargaining may be classified as mandatory, permissive and illegal. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54 (1974). A mandatory subject of bargaining is one over which the parties are required to bargain if it has been proposed by either party and neither party may take unilateral action on the subject absent an impasse in the negotiations. *Id.* 54–55. A permissive subject is one that the parties need not bargain over, but may bargain by mutual agreement and neither side may insist on bargaining to a point of impasse. *Id.* 54, n 6. In contrast, an illegal subject of collective bargaining is a provision that is unlawful under the collective bargaining statute or other applicable statute. *Id.* 54–55, n 6. As noted in *Police Officers, supra*, 55, n 6:
>
> > The parties are not forbidden from discussing matters which are illegal subjects of bargaining but a contract provision embodying an illegal subject is ... unenforceable.
>
> In the case at bar, section 15(4) does not use the phrase "illegal subject of collective bargaining" but rather "prohibited subject" of collective bargaining. The Court construes these phrases to be synonymous given the context and subject matter of section[s] 15(3), (4). [sic]. In any event there is no expressed intent to foreclose discussion on these matters. Rather what was 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. Finally, there is nothing in these sections that ... purports to restrain public school employees or their representatives from making their views on these subjects known to a local school board during a public meeting of the board.

The Union argues in its brief that the Supreme Court in *Michigan State AFL-CIO* implicitly rejected the Court of Appeals' finding that the Legislature intended to prohibit prohibited subjects from "ever becom[ing] part of a collective bargaining agreement" when the Supreme Court cited *Detroit Police Officers Ass'n*, n 6, in its decision. However, as noted above, the Court of Appeals also cited that footnote. In any case, it is unnecessary for me to decide what the Court of Appeals meant by this statement, since the Employer in this case unambiguously refused to agree to make any prohibited subject part of the agreement.

In *The Guard Publishing Co*, 351 NLRB 1100, (2007), the NLRB majority explained the effect of the classification of a topic as "illegal" under the NLRA as follows:

> A party violates its duty to bargain in good faith by insisting on an unlawful proposal. See, e.g., *Teamsters Local 20 (Seaway Food Town*), 235 NLRB 1554, 1558 (1978); *Thill, Inc*, 298 NLRB 669, 672 (1990), enfd in relevant part 980 F2d 1137 (Ca 7, 1992). However, a party does not necessarily violate the Act simply by proposing or bargaining about an unlawful subject. *Sheet Metal Workers Local 91 (Schebler Co*), 294 NLRB 766, 773 (1989), enfd in part 905 F.2d 417 (CA DC 1990). Rather, what the Act prohibits is "the insistence, as a condition precedent

of entering into a collective bargaining agreement," that the other party agree to an unlawful provision. *National Maritime Union (Texas Co.*), 78 NLRB 971, 981-982 (1948), enfd 175 F2d 686 (CA 2, 1949), cert denied 338 US 954 (1950).

As indicated in *The Guard,* a party does not violate its duty to bargain under the NLRA merely by presenting proposals on illegal subjects, or even by discussing/bargaining over such proposals. Rather it is a party's insistence on an illegal subject as a condition of agreement on a contract that violates its duty to bargain in good faith. Of course, it is well established that a party may also not insist on a permissive topic as a condition of its agreement to the contract as a whole. *Detroit Police Officers Ass'n; NLRB v Wooster Div of Borg-Warner,* 356 US 342 (1958). In sum, the chief distinction for bargaining purposes between a permissive and an illegal or prohibited subject of bargaining appears to be that provisions on illegal or prohibited subjects, if included by the parties in a collective bargaining agreement, are unenforceable.[7]

Under the NLRA, the fact that provisions on illegal topics are unenforceable does not give a party the right to insist that they be included in the contract. See, e.g., *California Pie Co,* 329 NLRB 968, 974 (1999). Here, the Union repeatedly attempted to convince the Employer to agree to include provisions covering prohibited topics from Articles 4 through 7 of the expired agreement in the successor agreement by using the argument that these provisions would be unenforceable, and presumably harmless, unless or until 2011 PA 103 was overturned by court or legislative action. The Union argued that if PA 103 is overturned in the future, the Union should not have to start afresh to bargain protections for teachers which it achieved through bargaining over the course of many years. However, I can find no precedent for holding that a party may lawfully insist on the inclusion in a contract of a provision on an illegal or prohibited subject because that provision would be unenforceable until it ceased to be illegal or prohibited. To the extent that the Union is asserting in this case that it had the right to insist on the inclusion in the successor contract of provisions from the expired contract covering prohibited subjects, I find its argument to be without merit.

As discussed above, the Union also argued during bargaining that the disputed provisions must be carried over into the successor agreement because any agreement to remove them would involve bargaining over prohibited subjects. It is not clear whether the Union is making this argument here. However, I find this argument to be without merit. As noted above, the fact that topics are illegal or prohibited subjects of bargaining does not prohibit the parties from discussing or even bargaining over them. Clearly, parties are not prohibited from agreeing <u>not</u> to include them in their collective bargaining agreement. Rather, it is the insistence by a party on their inclusion in the collective bargaining agreement that is prohibited.

The Union denies that it insisted on the inclusion of any prohibited topics in the successor agreement as condition of its agreement on the contract. The Union never stated, in so many words, that it would not agree to a contract that did not include these topics. In addition, the Union labeled all its proposals after September 6 "package" proposals, a term which normally means that the other party is required to either accept or reject all of the proposals contained

[7] A party may also violate PERA, or some other law, by enforcing or attempting to enforce an illegal provision if doing so requires one or both parties to perform an illegal act.

therein. However, during that period the parties reached tentative agreements on a number of individual provisions, even though the Employer did not accept any of the Union's proposals in their entirety. This indicates to me that the Union was not, in fact, insisting as a condition of agreement that the Employer accept its entire "package."

However, the fact remains that the Union continued to include provisions on prohibited topics in every bargaining proposal it made after September 6, 2011, even though the Employer repeatedly and unambiguously stated that it would not agree to include them in the successor agreement. The Union continued to include the provisions in its proposals even after the Employer, in the December 9, 2011 letter from its chief negotiator to Wilbur, accused the Union of violating its duty to bargain in good faith by maintaining those proposals. It continued to include the provisions in its proposals throughout mediation, and while the parties were reaching tentative agreements on a number of other contract issues. It included the provisions in the proposal it made after the Employer filed the instant unfair labor practice charge alleging that the Union was unlawfully insisting on these proposals. In *Laredo Packing Company*, 254 NLRB 1, 18 (1981), and *Union Carbide Corporation, Mining and Metals Division*, 165 NLRB 254, 255 (1967), enfd, *sub nom Oil, Chemical and Atomic Workers International Union, Local 3-89, AFL-CIO* v *NLRB*, 405 F2d 1111 (CA DC,1968), the Board suggested that party's insistence on a nonmandatory subject after the other party's "clear and express refusal to bargain" about the subject constitutes a violation of the duty to bargain. Here, the Employer clearly and unambiguously refused to bargain over the prohibited topics. I find, on these facts, that the Union did insist as a condition of its agreement on a contract that the Employer agree to include the prohibited topics, and I conclude that its insistence on these prohibited subjects violated its duty to bargain in good faith.

The Union argues that it has not insisted to impasse on the inclusion of the prohibited topics in the agreement because its position, i.e., that the disputed provisions from the expired contract be carried over into the successor agreement, has not prevented agreement between the parties. The Union points out that there are other important issues involving clearly mandatory subjects, including wages and insurance, that remain unresolved, and that the Union's position has not prevented the parties from continuing to bargain over mandatory subjects. I take the Union's argument to be that if the parties have or in the future reach impasse on a contract, it will be the parties' disagreement over mandatory subjects and not the Union's insistence on the inclusion of the prohibited topics which caused or causes the impasse. However, as the Board stated in *Taft Broadcasting Co, WDAF AM-FM TV,* 163 NLRB 475, 478 (1967), a "deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions."

In addition to its claim that the Union's insistence on the retention of the proposals has effectively created an impasse, the Employer argues that the Union's insistence on these proposals has obstructed and impeded the bargaining process. I agree. Because the Union has continued to include the prohibited subjects in its bargaining proposals, the Employer has no way to assess whether the positions the Union has taken on the other issues in dispute are serious or merely constitute cover for the Union's attempt to coerce the Employer into bargaining over the prohibited topics. I conclude that by continuing to insist on the proposals after the Employer

unequivocally refused to discuss them, the Union impeded the bargaining process, and interfered with the resolution of the parties' dispute, by obscuring the true nature of that dispute.

Based on my conclusions of law above, I recommend that the Commission issue an order finding the Union to have violated its duty to bargain in good faith by unlawfully insisting as a condition of agreement on a contract that the Employer agree to include provisions on prohibited topics in this contract. I also recommend that the Commission find the Union to have violated its duty to bargain in good faith, and obstructed and impeded the bargaining process, by continuing to make proposals dealing with nonmandatory subjects after the Employer unequivocally refused to bargain over these proposals.

The Union's Proposed Duration Clause

The Employer also alleges that the Union has violated its duty to bargain by proposing, and continuing to insist upon, a duration clause for the contract that is an illegal subject of bargaining because it would require the Employer to violate §15(b) of PERA. Section 15(b) states, in pertinent part:

> Sec. 15b. (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits.
>
> * * *
>
> (4) As used in this section:
>
> > (a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

The Employer argues that the duration clause first proposed by the Union on January 9, 2012, although nominally containing an expiration date of December 13, 2013, would require all terms and conditions of the expired collective bargaining agreement to continue in effect during any hiatus between the predecessor and successor contracts. These would include, although not be limited to, increased employer insurance contributions under Article 10 of the contract, as proposed by the Union, and step increases for increased experience and educational attainment under both parties' proposals. Thus, according to the Employer, if the parties failed to reach

agreement on a new contract before December 13, 2012, the Union's duration clause would require the Employer to pay wages and benefits in excess of those in effect at the expiration date after the expiration date. The Employer asserts that because the clause would require it to perform an illegal act, the proposed duration clause is an illegal subject of bargaining.

The Union admitted at oral argument that the intent of its duration clause proposal was to keep the obligation to pay step increases and maintain existing benefits in effect after December 13, 2012 and until the parties reached agreement on a successor contract. It disagrees that doing so would cause the Employer to violate§15(b). It argues that §15(b) is not implicated because under the Union's duration clause proposal there is, in effect, no expiration date to the contract. According to the Union, §15(b) was intended to deal with situations where the parties attempted to agree, after contract expiration or during negotiations, to extend the contract. It was not, according to the Union, intended to prohibit parties from entering into a contract that does not expire until the parties reach agreement on the terms of a new agreement. The Union also points out that §15(b) deals only with wages and benefits. That section does not prohibit parties from agreeing to extend other terms and conditions of employment, e.g., grievance arbitration, beyond the contract term. It argues that if the duration clause, in fact, requires the Employer to do something prohibited by §15(b), it is simply unenforceable to that extent.

Clauses which provide for automatic renewal of the contract in the event appropriate notice is not given are standard in labor relations. The clause proposed by the Union, however, is different from the standard clause because it extends the contract until the parties reach agreement on the terms of a successor. Like the duration clause in *Pinckney Cmty Schs,* 1994 MERC Lab Op 376, which the Union cites in its brief, the clause here does not provide a mechanism for either party to terminate the old contract short of reaching a new agreement. As the Union notes in its brief, there is effectively no expiration date to the contract which it proposes. In *Pinckney*, the duration clause in the parties' contract stated that the agreement "shall remain in full force and effect until August 31, 1992, or until a successor agreement is reached." The question before the Commission in that case was whether the employer violated its duty to bargain by repudiating that agreement after sending the union notice, in December 1992, that it intended to terminate it after 60 days. The Commission majority found that after August 31, 1992, the agreement became a contract for an indefinite term. Applying general contract law principles, it concluded that the employer was then entitled to terminate the contract after supplying the union with reasonable notice. It held that 60 days was reasonable notice in that case. It concluded, therefore, that the employer had not committed an unfair labor practice by repudiating the agreement. [8]

I conclude that the Employer would not be compelled by the proposed duration clause to pay and provide wages and benefits at levels and amounts greater than those in effect on December 13, 2013 because, under *Pinckney Cmty Schs,* the Employer could simply terminate the contract after December 13, 2013 without violating its obligations under PERA as long as it

[8] The Court of Appeals, in an unpublished decision, affirmed the dismissal of the charge but on the grounds that, in its view, the contract expired by its terms on August 31, 1992. The Court explicitly stated that it was not deciding in that case whether a contract clause that merely provided that the agreement remain in effect "until a successor agreement is reached" was a contract of indefinite duration. See *Pinckney Cmty Schs,* 9 MPER 27054 (1996).

provided the Union with reasonable notice. I conclude, therefore, that the proposed duration clause was not an illegal subject of bargaining.

The Employer did not argue that the Union's proposed duration clause was a permissive subject of bargaining. I note, however, that there is some authority for the proposition that a duration clause which binds the parties to an expired agreement until a new agreement is reached is a permissive, and not a mandatory, subject of bargaining. In *Servicenet, Inc*, 340 NLRB 1245, 1247 (2003), the NLRB held that although a clause covering the duration of a collective bargaining agreement is ordinarily a mandatory subject of bargaining, a duration clause which bound the parties to an expired agreement until a new agreement was reached was a permissive subject because it required both parties to relinquish their rights to use their economic weapons – strikes and lockouts - in support of their bargaining positions. Although economic weapons do not play the same role under PERA, the fact that the Union's proposed duration clause would require the Employer to forego its right to unilaterally impose changes in mandatory subjects after reaching a valid bargaining impasse on the terms of a successor agreement might justify a finding that the proposed duration clause was a permissive topic only.

I need not resolve this question, however, because I conclude that the facts do not indicate that the Union insisted on its duration clause proposal as a condition of agreement on the contract. The duration clause proposal was first made on January 9, 2012 and included in the proposal the Union made on February 29, 2012 after it requested fact finding. It was also listed as an unresolved issue on the Union's fact finding petition. However, there is no indication that the Employer expressly rejected this proposal at either the January 9 bargaining session or the subsequent mediation session held on February 9, 2012. Nor do the facts indicate that the Employer ever unequivocally told the Union that it would not bargain over a duration clause that bound the Employer until the parties reached agreement on a successor agreement. Based on these facts, I conclude that the Union did not unlawfully insist on the duration clause it proposed on January 9, 2012 or condition its agreement on a contract on the Employer's agreement to this clause. I recommend, therefore, that the Commission dismiss the Employer's allegation that the Union violated its duty to bargain by proposing or by continuing to insist on the duration clause.

RECOMMENDED ORDER

Respondent Calhoun Intermediate Education Association, MEA/NEA, its officers and agents, are hereby ordered to:

1. Cease and desist from:

   a. Insisting as a condition of its agreement on successor to its 2009-2011 collective bargaining agreement with the Calhoun Immediate School District that the School District agree to include provisions on prohibited bargaining subjects.

   b. Bargaining in bad faith, and obstructing and impeding the bargaining process, by continuing to make proposals at the bargaining table dealing

with prohibited subjects after the School District had unequivocally refused to bargain over these proposals.

2. Take the following affirmative action to effectuate the purposes of the Act:

a. Withdraw any outstanding bargaining proposals dealing with prohibited subjects.

b. Transmit a copy of the attached notice to all members of its bargaining unit by mail, posting, or other appropriate method of communication, within a reasonable time, not to exceed 30 days, after the date of this order.

The allegation that Respondent bargained in bad faith by proposing an illegal duration clause for the successor agreement and/or by continuing to insist on that proposal is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____