STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent in Case No. C11 K-197,
Charging Party in Case No. CU12 D-019,

-and-

PONTIAC EDUCATION ASSOCIATION,
Labor Organization-Charging Party in Case No. C11 K-197,
Respondent in Case No. CU12 D-019.
_____/

APPEARANCES:

The Allen Law Group, P.C., by George D. Mesritz and Shaun P. Ayer, for the Respondent/Charging Party Public Employer

Law Offices of Lee & Correll, by Michael K. Lee and Megan R. McGown, for the Charging Party/Respondent Labor Organization

DECISION AND ORDER

On September 27, 2013, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the Respondent in Case No. C11 K-197, Pontiac School District (Employer), did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, when it unilaterally transferred Sue Lieberman, a member of the bargaining unit represented by Charging Party Pontiac Education Association (Union). The ALJ concluded that pursuant to § 15(3)(j) of PERA, the Employer had no duty to bargain regarding Lieberman's transfer, as the matter is a prohibited subject of bargaining. In Case No. CU12 D-019, the ALJ found that the Union breached its duty to bargain in good faith by seeking to arbitrate the grievance it filed over Lieberman's transfer. The ALJ concluded that in attempting to arbitrate a prohibited subject of bargaining, such as a decision regarding teacher placement, the Union was attempting to enforce an unenforceable provision of the parties' expired contract. As a remedy, the ALJ recommended that we order the Union to reimburse the Employer for its costs, including attorney fees, if any, incurred in the arbitration regarding the grievance over Lieberman's transfer. However, the ALJ held that the Union's filing of an unfair labor practice charge regarding the transfer of a second bargaining unit member is not an unfair labor practice. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

On October 17, 2013, the Union filed exceptions to the ALJ's Decision and Recommended Order, a request for oral argument, and a brief in support of the exceptions. On

October 22, 2013, the Employer filed a brief in support of the ALJ's Decision and Recommended Order. After reviewing the exceptions, we find that oral argument would not materially assist us in deciding this case and, therefore, deny the Union's request for oral argument.

In its exceptions, the Union contends that the ALJ erred by: (1) concluding that Lieberman is a certified teacher subject to the Teachers' Tenure Act, 1937 PA 4, MCL 38.71 – 38.191 and § 15(3)(j) of PERA; (2) by concluding that the Union violated its duty to bargain in good faith by processing to arbitration the grievance concerning Lieberman's reassignment; and (3) by recommending that the Union be required to pay the Employer's costs and attorney fees incurred in those arbitration proceedings. After a careful and thorough review of the record, we find merit to the Union's exception regarding the ALJ's recommendation that the Union be required to pay the Employer's costs and attorney fees in the arbitration proceedings, but find no merit to the remainder of the Union's exceptions.

Factual Summary:

The Union and the Employer were parties to a 2007-2011 collective bargaining agreement that expired August 31, 2011. Article 6 of that contract set forth the parties' agreement with respect to vacancies and transfers. Section B of Article 6 required involuntary transfers to be based on seniority, such that the least senior teacher would be transferred. That Section also provided that when the Employer involuntarily transferred a teacher, that teacher would be given priority in filling the first vacancy for which he or she was certified and qualified in the previous building, elementary grade level, subject area, or program. Section B of Article 6 also required the Employer to notify the teacher and the Union of the reasons for transferring a teacher when the transfer was for reasons other than a reduction in students or funding. That Section of the contract also required the Employer to give the teacher being transferred and the Union the opportunity to meet with the appropriate official in the Employer's personnel office to review the reasons for the transfer.

Effective July 19, 2011, Public Act 103 amended § 15(3) of PERA to add several provisions prohibiting collective bargaining between public school employers and representatives of their employees over certain issues, including decisions regarding teacher placement or the impact of those decisions. The teacher transfer at issue here is covered by § 15(3)(j) 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.

A member of the bargaining unit represented by the Union, Sue Lieberman, was laid off from her position as a high school speech pathologist following the 2010-2011 school year. She was not allowed to move to a vacant position at the middle school and was, instead, placed at an

elementary school. The Union filed a grievance regarding Lieberman's transfer and subsequently advanced the grievance to arbitration. The Union also filed the charge in Case No. C11 K-197, contending, among other things, that Lieberman's transfer was an unlawful unilateral change in terms and conditions of employment.

In December of 2011, another member of the bargaining unit represented by the Union, Janet Threlkeld-Brown, was displaced by a reduction in force. She accepted a new assignment at the Employer's middle school. On January 23, 2012, the day she reported to the middle school, Threlkeld-Brown was accused of inappropriate conduct. That incident resulted in her subsequent reassignment to the high school. The Union filed an unfair labor practice charge, in Case No. C12 D-070, contending among other things, that the transfer of Threlkeld-Brown to the high school was an unlawful unilateral change in terms and conditions of employment.[1] Subsequently, the Employer filed the charge in Case No. CU12 D-019 asserting that the Union violated its duty to bargain in good faith by advancing the Lieberman grievance to arbitration and by filing the unfair labor practice charge in Case No. C12 D-070 regarding the transfer of Threlkeld-Brown.

Discussion and Conclusions of Law

On exceptions, the Union contends that the ALJ erred in finding that the unilateral reassignment of Lieberman is a prohibited subject of bargaining under § 15(3)(j) of PERA. We agree with the ALJ, for the reasons stated in his decision, that the Employer had no duty to bargain over Lieberman's reassignment since Lieberman's placement is subject to§ 15(3)(j).

The Union contends that the definition of "placement" does not include the reassignment or transfer of a teacher and that it "suggests an initial action" rather than a reassignment or transfer. The Union relies on the definition of placement found in *Merriam-Webster Dictionary* (1974), and asserts "'placement' is defined as 'an act or instance of placing.'" We also look to the definition of placement found at www.Merriam-Webster.com/dictionary, which further defines "placement" as "an act or instance of placing: as . . . the assignment of a person to a suitable place (as a job or a class in school)." We find nothing in these definitions of "placement" that would limit it to a single or initial assignment. An initial placement does not preclude a second or subsequent placement. The fact that Lieberman had been assigned to a particular school and was subsequently assigned elsewhere does not prevent the later assignment from being a placement under § 15(3)(j).

We considered the meaning of the language of § 15(3)(j) in *Ionia Pub Sch*, 27 MPER 55 (2014). There we explained, "the language '[a]ny decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit' gives public school employers broad discretion." Among other things, placement under § 15(3)(j) includes reassignment, transfer, or other actions by a public school employer to move an employee to a different school or location as the Employer did with

[1] In *Pontiac Sch Dist*, 27 MPER 52 (2014), upon finding that Threlkeld-Brown's reassignment was a prohibited subject of bargaining under Section 15(3)(j) of PERA, we dismissed the charge. That matter is currently pending before the Michigan Court of Appeals, Docket No. 321221.

Lieberman and Threlkeld-Brown. Therefore, the Employer's decisions regarding the placement of these employees is a prohibited subject of bargaining.

The Union asserts in its exceptions that Lieberman was not covered by the 2011 amendments to the Teachers' Tenure Act and PERA. The Union argues that Lieberman is a speech pathologist and not a teacher as defined by MCL 38.71. We note that § 1(1) of the Teachers' Tenure Act, 1937 PA 4, MCL 38.71(1) defines "teacher" as follows: "The term 'teacher' as used in this act means a certificated individual employed for a full school year by any board of education or controlling board." Although the Employer has repeatedly claimed that Lieberman is a teacher, the Union did not contest that until it filed its exceptions to the ALJ's decision.

The Union asserted in the charge filed November 17, 2011, that the Employer "unilaterally transferred Sue Lieberman . . . , a speech therapist, . . . erroneously claiming that it had the right to do so under the revisions to the PERA." The Union repeated the allegation in its First Amended Charge, filed February 17, 2012, but did not deny that Lieberman was a teacher. In the Employer's March 2, 2012 answer to the Union's First Amended Charge, the Employer alleged that it lawfully placed Lieberman, "who is a teacher." In the Employer's charge in Case No. CU12 D-019, filed April 25, 2012, the Employer asserted "Sue Lieberman was and is a certified teacher employed by the district." On June 12, 2012, the ALJ directed the parties to file position statements "addressing the issue of whether the school district's decision to reassign teachers constitutes a 'placement' decision within the meaning of MCL 423.215(3)(j) of PERA." In its July 3, 2012 position statement, the Union contends that the reassignment of its members is not a placement under PERA and seeks to distinguish the meaning of "placement" from the meaning of "reassignment." However, the Union does not contend in the position statement that Lieberman is not a teacher. Nor does the Union assert that the issue addressed by the position statement is limited to the reassignment of Threlkeld-Brown, whose status as a teacher is apparently uncontested. In its First Amended Charge, filed July 27, 2012, the Employer repeated the allegation that "Sue Lieberman was and is a certified teacher employed by the district." At the oral argument conducted in this matter on September 14, 2012, the Employer referred to Lieberman as a teacher on three occasions. The Union did not dispute the Employer's reference to Lieberman as a teacher during the oral argument. Moreover, the Union did not argue that Lieberman was not a certified teacher at the time of her reassignment and did not contend that, for that reason, her placement is not covered by § 15(3)(j). It was up to the Union to raise this issue when the matter was before the ALJ. If Lieberman's status as a teacher is disputed, the Union should have notified the ALJ that there is a disputed material fact and sought the opportunity to present evidence supporting its position. Since Lieberman's status as a teacher was not raised as an issue before the ALJ, the issue is not properly before us. *Pontiac Sch Dist*, 27 MPER 52 (2014); *City of Detroit*, 1993 MERC Lab Op 131, 132; 6 MPER 24028; *Teamsters Local 580*, 1991 MERC Labor Op 575, 576.

The Union also excepts to the ALJ's finding that the Union violated its duty to bargain by processing a grievance over a prohibited subject of bargaining to arbitration. For the reasons stated in his decision, we agree with the ALJ. Prohibited subjects can never become an enforceable part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). As the ALJ concluded, by taking the

grievance over Lieberman's placement to arbitration, the Union was attempting to enforce provisions in the expired collective bargaining agreement that, as of July 19, 2011, had become prohibited subjects of bargaining.

Although the parties may discuss a prohibited subject of bargaining, neither party may insist on carrying that discussion beyond the limits set by the other party. In *Calhoun Intermediate Ed Assn, MEA/NEA*, 28 MPER ___ (Case No. CU12 B-009, issued September 15, 2014), we found that the union's persistence in demanding bargaining over prohibited subjects as a condition of reaching a successor agreement was indicative of bad faith and constituted an unfair labor practice. In this matter, the Union's actions in advancing the Lieberman grievance to arbitration are analogous to insistence on negotiating over prohibited subjects of bargaining when the other party has repeatedly refused to negotiate those matters, as in *Calhoun*. Here the Union was attempting to use the arbitration process to force the Employer to go beyond the discussion stage of the grievance process to unlawfully enforce contract provisions and/or past practices made unenforceable by § 15(3)(j) of PERA.

The Union also excepts to the ALJ's recommendation that it be required to pay the Employer's costs and attorney fees incurred in the arbitration proceedings regarding the Lieberman grievance. The Union asserts that the Commission is not authorized to order the payment of costs and attorney fees.

Our authority to award remedies stems from § 16(b) of PERA which states in relevant part:

> If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order.

In determining whether costs or attorney fees may be awarded, Michigan follows the American Rule, which provides that attorney fees and costs are not recoverable unless authorized by statute or a recognized common-law exception. *Goolsby v Detroit*, 211 Mich App 214, 224 (1995). When this issue arises under PERA, reference is often made to the language "take such affirmative action . . . as will effectuate the policies of this act" to justify the extraordinary relief of attorney fees and costs. However, as the Court of Appeals pointed out in *Goolsby*, that language is not sufficiently specific to authorize an award of either attorney fees or costs. Inasmuch as § 16(b) of PERA does not authorize us to award costs, we find that the ALJ exceeded his authority when he recommended that we order the Union to reimburse the Employer for costs and attorney fees incurred as a result of the arbitration of the Lieberman grievance.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find that the Employer had no duty to bargain regarding Lieberman's transfer, as the matter is a prohibited subject of bargaining under § 15(3)(j) of PERA. We further find that the Union violated its duty to bargain under § 10(3)(c)[2] by advancing the Lieberman grievance to arbitration, but is not required to reimburse the Employer for the costs and attorney fees the Employer incurred as a result of the arbitration.

ORDER

The unfair labor practice charge filed by the Pontiac Education Association against the Pontiac School District in Case No. C11 K-197 is hereby dismissed in its entirety.

With respect to the charge filed by the Pontiac School District in Case No. CU12 D-019, it is hereby ordered that the Pontiac Education Association, its officers, agents and assigns, shall:

1. Cease and desist from seeking to arbitrate grievances concerning matters which constitute prohibited subjects of bargaining under § 15(3)(j) of PERA.

2. Advise the arbitrator of the Union's withdrawal of the grievance filed by the Union regarding the reassignment of certified teacher Sue Lieberman.

3. Refrain from any effort at enforcing any arbitration award which may have already been issued regarding the reassignment of Sue Lieberman.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Natalie P. Yaw, Commission Member

Dated: October 16, 2014

[2] Amendments to § 10 of PERA in 2012 moved the language prohibiting labor organizations from refusing to bargain from § 10(3)(c) to § 10(2)(d).

COMMISSIONER LABRANT, CONCURRING SEPARATELY:

I concur with the result reached in this matter by the majority, for the reasons stated above.

However, I do not agree with the ALJ's recommendation to dismiss the part of the Employer's charge in Case No. CU12 D-019 asserting that the Union violated its duty to bargain in good faith by filing the unfair labor practice charge in Case No. C12 D-070 regarding the transfer of Threlkeld-Brown. The ALJ reasoned:

> The amendment to PERA which added Section 15(3)(j) became effective July 19, 2011. At the time of the events giving rise to the dispute in Case No. C12 D-070; Docket No. 12-000646-MERC, there were no reported decisions by either the Commission or its ALJs interpreting the meaning or scope of Section 15(3)(j). While it is conceivable that the filing of multiple charges in the face of established contrary case law could constitute a violation of Section 10(1)(e) of the Act, I find that the mere act of filing of a single charge under these circumstances cannot be considered a violation of the Union's statutory responsibilities.

The treatment of prohibited subjects of bargaining is indeed established law. The Legislature initially added prohibited subjects of bargaining to the Public Employment Relations Act with 1994 PA 112. The constitutionality and effect of those provisions were considered by the Michigan Supreme Court in *Michigan State AFL-CIO v MERC*, 453 Mich 362 (1996). In that case the Supreme Court affirmed the Court of Appeals finding that the Legislature intended "to foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them or that they could ever become part of a collective bargaining agreement." *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995).

In my opinion, the Union's filing of an unfair labor practice charge challenging the Employer's failure to apply provisions of an expired contract regarding prohibited subjects of bargaining is, in itself, an unfair labor practice. It is clear from established law that a school district cannot be found to have committed an unfair labor practice by refusing to bargain over a prohibited subject of bargaining. Accordingly, I conclude that the Union filed an action with no arguable merit. If the Employer had filed exceptions on that issue, I would have reversed the ALJ's decision regarding his recommendation that we find the Union did not commit an unfair labor practice by filing the charge in Case No. C12 D-070.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Robert S. LaBrant, Commission Member

Dated: October 16, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Respondent-Public Employer in Case No. C11 K-197; Docket No. 11-000562-MERC,
Charging Party in Case No. CU12 D-019; Docket No. 12-000694-MERC,

-and-

PONTIAC EDUCATION ASSOCIATION,
Charging Party-Labor Organization in C11 K-197; Docket No. 11-000562-MERC,
Respondent in Case No. CU12 D-019; Docket No. 12-000694-MERC.
_____/

APPEARANCES:

The Allen Law Group, P.C., by George D. Mesritz and Shaun P. Ayer, for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this matter was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, including the briefs and the documents attached thereto, as well as the transcript of oral argument, I make the following findings of fact, conclusions of law and recommended order.

The Charges and Procedural History:

The Pontiac Education Association (hereafter "the Union" or "the PEA") represents a bargaining unit of certified and other instructional personnel, including teachers, employed by the Pontiac School District (hereafter "the Employer" or "the school district"). On November 17, 2011, the Union filed a multi-count unfair labor practice charge against the school district which was assigned Case No. C11 K-197; Docket No. 11-000562-MERC. The charge, as amended on February 17, 2012, sets forth the following separate counts: (1) unlawful rejection by the school board of a tentative agreement; (2) regressive bargaining; (3) direct dealing; (4) unilateral addition of professional development days; (5) unilateral transfer of certified teacher

Sue Lieberman; (6) refusal to recognize the bargaining representative; and (7) unlawful termination of the grievance procedure.

On April 25, 2012, the school district filed a charge against the PEA in Case No. CU12 D-019; Docket No. 12-000694-MERC. The charge, as amended on July 27, 2012, asserts that the Union violated PERA by filing a grievance over the Employer's decision to reassign Lieberman to a new position and by seeking to have that grievance heard by an arbitrator. The charge further contends that the Union violated the Act by filing an unfair labor practice challenging the school district's decision to transfer certified teacher Janet Thelkeld-Brown. According to the charge, the Union's actions were unlawful because the reassignment of Lieberman and the transfer of Brown were both decisions pertaining to teacher placement and therefore, were prohibited subjects of bargaining under Section 15(3)(j) of PERA, MCL 423.215(3)(j).

I consolidated the charges and held pretrial conferences with the party representatives on April 30, 2012 and June 4, 2012. The pretrial conferences resulted in a partial settlement which included the withdrawal by the Union of Counts 1, 2, 3, 6 and 7 of the unfair labor practice charge in Case No. C11 K-197. Following the June 4, 2012 pretrial conference, I adjourned the evidentiary hearing so that the parties could continue settlement discussions on the remaining issues. At the same time, however, I directed the parties to submit written position statements addressing the issue of whether the reassignment of Lieberman and the transfer of Brown were "placement" decisions within the meaning of Section 15(3)(j) so as to constitute prohibited subjects of bargaining under the Act.

The PEA and the school district filed their position statements regarding the "placement" issue on July 3, 2012 and July 6, 2012 respectively. In an order issued on July 13, 2012, I concluded that the reassignment of Lieberman and the transfer of Brown appeared to constitute prohibited subjects of bargaining under Section 15(3)(j) of PERA and, therefore, summary disposition in favor of the Employer was appropriate with regard to the unfair labor practice charge filed by the school district in Case No. CU12 D-019 and with respect to Count 5 of the charge filed by the Union in Case No. C11 K-197. By letter dated July 20, 2012, the Union requested oral argument concerning the "placement" issue.

Oral argument was held on September 14, 2012. Following the hearing, the parties notified my office in writing they had voluntarily resolved Count 4 of the charge in Case No. C11 K-197, in which the Union had alleged that the Employer violated PERA by unilaterally adding professional development days to the teacher schedule. With the withdrawal of that allegation, the only remaining issues in this matter are whether the school district violated PERA by reassigning Lieberman without bargaining (Count 5 of the charge in Case No. C11 K-197) and whether the Union acted unlawfully by filing a grievance challenging the reassignment of Lieberman and an unfair labor practice charge over the transfer of Brown (Case No. CU12 D-019).

Findings of Fact:

The relevant facts in this matter are not in dispute. The most recent collective bargaining agreement between the parties covered the period 2007-2011. Article 6 of that agreement

addresses vacancies and transfers. Article 6, Section B provides that if an involuntary transfer is necessary, the teacher with the least seniority will be transferred. Pursuant to the contract, the teacher being transferred shall have priority in filling the first vacancy for which he or she is certified and qualified in the previous building, elementary grade level, subject area or program. The contract further provides that where a transfer is "desirable for a reason other than a reduction in students or in allocated funds," the teacher and the Union shall be informed of the reasons for the change of assignment and given an opportunity to meet with an administrator.

During the 2010-2011 school year, the school district laid off a number of certified teachers, including Sue Lieberman and Janet Threlkeld-Brown. Lieberman was removed from her position as a speech pathologist at the high school and was not allowed to claim a middle school position which was vacant at the time. Instead, she was assigned to a position within one of the school district's elementary schools. The Employer posted Lieberman's former high school position as a vacancy and hired an individual from outside the school district to fill the job. The Union filed a grievance challenging the Employer's decision to transfer Lieberman and proceeded to arbitrate the grievance over the school district's objections. The decision of the grievance arbitrator was still pending at the time of oral argument in this matter.

Following her layoff in December of 2011, Brown was allowed by the Employer to select a new position at the middle school. She was directed to report for work on January 23, 2012. On that date, Brown became involved in a confrontation with administrators at the middle school during which harsh words were exchanged. The school district directed Brown to return to the human resources office to be reassigned for disciplinary reasons. Thereafter, Brown was transferred to a teaching position at the high school. On April 6, 2012, the Union filed an unfair labor practice charge in Case No. C12 D-070; Docket No. 12-000646-MERC alleging that the second transfer of Brown constituted a unilateral change in established conditions of employment. The Union asserted that the parties' expired contract allowed employees to be involuntarily transferred to a different assignment only in connection with a layoff or a reduction in force. On March 12, 2013, ALJ Julia Stern issued a Decision and Recommended Order dismissing the charge based upon her conclusion that the transfer of Brown was a prohibited subject of bargaining under Section 15(3)(j) of PERA. Exceptions are currently pending as to that decision.

Discussion and Conclusions of Law:

Effective July 19, 2011, the Legislature amended Section 15 of PERA to make certain topics prohibited subjects of bargaining for public school employers and the unions representing their teachers, including "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." MCL 423.215(3)(j). In *Ionia Public Schools*, Case No. C12 G-136; Docket No. 12-001241-MERC, issued March 1, 2013 and currently pending on exception, I concluded that Section 15(3)(j) of the Act unambiguously gives public school employers broad discretion to make placement decisions without bargaining the decision or the effects thereof and that any limitation on that discretion would be contrary to the plain reading of the statute. In *Ionia*, the union filed a charge alleging that the employer had violated PERA by repudiating its contractual obligation to hold a "bid-bump" meeting to post vacancies for teaching positions. In recommending dismissal

of the charge, I held that the conduct described therein fell within the ordinary definition of the term "placement" which Webster's dictionary defines as, "The assignment of a person to a suitable place as a job or a class in school." I find in the instant case that the school district was similarly acting in a manner specifically contemplated by the amendment to PERA when it unilaterally reassigned Lieberman without bargaining with the Union. Such actions were clearly prohibited subjects of bargaining based upon the broad language of Section 15(3)(j) of the Act. [3]

I also agree with the Employer's contention that the Union violated its duty to bargain in good faith under Section 10(1)(e) of the Act by processing a grievance concerning the reassignment of Lieberman to arbitration. As I discussed in *Waterford Sch District*, 23 MPER 91 (2010) (no exceptions), the fact that a topic is an illegal or prohibited subject of bargaining does not make it unlawful for parties to discuss or even bargain over it. The Legislature's intent in delineating certain topics as prohibited subjects of bargaining was merely to ensure that a public school employer could not be found guilty of an unfair labor practice by refusing to bargain over the subjects identified in Section 15, and also to prohibit these subjects from becoming part of an enforceable contract. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995). See also *Grand Haven Pub Sch*, 19 MPER 82 (2006); *Parchment Sch Dist*, 2000 MERC Lab Op 110 (no exceptions). It is a party's insistence on an illegal or prohibited subject of bargaining as a condition of employment that constitutes a violation of the duty to bargain in good faith. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44 (1974); See also *Wooster Div of Borg-Warner*, 356 US 342 (1958); *The Guard Publishing Co*, 351 NLRB 1100 (2007). A public school employer may put an end to discussions about a prohibited subject at any time by either taking unilateral action on the matter or by demanding the immediate cessation of those discussions. See *Kalamazoo County*, 22 MPER 94 (2009).

It is unlikely that the mere filing of a grievance which concerns, in whole or in part, a prohibited subject of bargaining could ever constitute a violation of Section 10(1)(e) of PERA. Grievance meetings are an integral part of the collective bargaining process. *Saginaw Twp*, 18 MPER 30 (2005); *Wayne County Cmty Coll*, 16 MPER 19 (2003). See also *John Wiley & Sons v Livinston*, 376 US 543, 549 (1964). Therefore, I find that it was not unlawful for the Union in this matter to have grieved the reassignment of Lieberman for the purpose of attempting to engage the school district in a discussion concerning the appropriateness of the transfer and to seek an agreement with the Employer on an alternative course of action with respect to Lieberman's job placement. Pursuant to Section 15(3)(j), however, the school district had the absolute right to end those discussions at any time. By advancing the matter to arbitration over

[3] My conclusion is consistent with ALJ Stern's decision regarding the transfer of Brown in Case No. C12 D-070; Docket No. 12-000646-MERC, as described above, as well as the ALJ's Decision and Recommended Order in *Pontiac School District*, Case No. C12 D-079; Docket No. 12-000690-MERC issued December 11, 2012, in which Stern held that Section 15(3)(j) of PERA made the parties' practice of permitting teachers to choose their new assignment after being displaced by a layoff a prohibited subject of bargaining. See also *Ionia Public Schools*, Case Nos. C12 E-094 & CU12 C-013; Docket Nos. 12-000794-MERC & 12-000496-MERC, issued March 29, 2012 (the employer did not violate PERA by conditioning its agreement to the terms of a new collective bargaining agreement on the wholesale revision or removal of provisions of the expired contract, including language covering teaching assignments vacancies and transfers and layoff and recall). All of the above decisions are currently pending Commission decision on exception.

the Employer's objection, the Union was not only attempting to compel the Employer to discuss the grievance, it was also seeking to enforce through the grievance procedure contract provisions and/or past practices which were explicitly made unenforceable by Section 15(3)(j) of the Act. See *Grand Rapids Educational Support Personnel Ass'n*, 23 MPER 5 (2009) (union violated PERA by demanding the arbitration of a grievance concerning subcontracting of transportation services, a matter made a prohibited subject of bargaining by Sections 15(3)(f) and (4) of the Act).[4] For this reason, I conclude that the PEA violated its duty to bargain under Section 10(1)(e) of PERA by advancing the Lieberman grievance to arbitration. Cf. *Local 1277, Metropolitan Council No. 23, AFSCME, AFL-CIO v City of Center Line*, 414 Mich 642, 653 (it is an unfair labor practice for either party to submit a nonmandatory subject of bargaining to binding arbitration under Act 312).

I reach a different conclusion, however, with respect to the school district's contention that the Union violated its duty to bargain in good faith PERA under by filing an unfair labor practice charge concerning the transfer of Brown. The charge filed by the Union in Case No. C12 D-070; Docket No. 12-000646-MERC did not constitute an attempt to force the Employer to agree to a prohibited subject of bargaining. Unlike a grievance proceeding, unfair labor practice cases before MERC are not part of the bargaining process. By filing a charge with the Commission, the Union was seeking a determination as to whether the transfer of Brown constituted a unilateral change in terms or conditions of employment in violation of Section 10(1)(e) of PERA or a "decision regarding teacher placement" for purposes of Section 15(3)(j) of the Act as asserted by the school district. The Commission has exclusive jurisdiction to determine whether an unfair labor practice has been committed under Section 10 of PERA. *Rockwell v Crestwood Sch Dist*, 393 Mich 616 (1975); *Lamphere Schs v Lamphere Fed of Teachers*, 400 Mich 105 (1977). Moreover, the charge filed by the Union raised an issue of first impression. The amendment to PERA which added Section 15(3)(j) became effective July 19, 2011. At the time of the events giving rise to the dispute in Case No. C12 D-070; Docket No. 12-000646-MERC, there were no reported decisions by either the Commission or its ALJs interpreting the meaning or scope of Section 15(3)(j). While it is conceivable that the filing of multiple charges in the face of established contrary case law could constitute a violation of Section 10(1)(e) of the Act, I find that the mere act of filing of a single charge under these circumstances cannot be considered a violation of the Union's statutory responsibilities.

I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. With respect to the charge filed by the Union in Case No. C11 K-197; Docket No. 11-000562-MERC, I find that the Employer did not violate Section 10(1)(e) of PERA by unilaterally reassigning Sue Lieberman to a new position within the school district because that decision was a prohibited subject of bargaining under Section 15(3)(j) of the Act. With respect to Case No. CU12 D-019; Docket No. 12-000694-MERC, I conclude that the Union did not breach its duty to bargain in good faith by filing an

[4] Although the ALJ in *Grand Rapids Educational Support Personnel Ass'n* found that the union committed an unfair labor practice by attempting to enforce through the grievance procedure a legally unenforceable contract provision, she ultimately recommended dismissal of the charge on the ground that it was not timely filed under Section 16(a) of PERA. After the issuance of the ALJ's decision, the employer informed MERC that it wished to withdraw the charge and the Commission approved the withdrawal.

unfair labor practice charge regarding the transfer of Janet Threlkeld-Brown. However, I find that the Union's decision to advance the Lieberman grievance to arbitration was an unlawful attempt to enforce through the grievance procedure terms and conditions of employment about which bargaining is prohibited under Section 15(3)(j) of the Act. In accordance with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following Order. [5]

RECOMMENDED ORDER

The unfair labor practice charge filed by the Pontiac Education Association against the Pontiac School District in Case No. C11 K-197; Docket No. 11-000562-MERC is hereby dismissed in its entirety.

With respect to the charge filed by the Pontiac School District in Case No. CU12 D-019; Docket No. 12-000694-MERC, it is hereby ordered that the Pontiac Education Association, its officers, agents and assigns, shall:

4. Cease and desist from seeking to arbitrate grievances concerning matters which constitute prohibited subjects of bargaining under Section 15(3)(j) of PERA.

5. Advise the arbitrator of the Union's withdrawal of the grievance filed by the Union regarding the reassignment of certified teacher Sue Lieberman.

6. Refrain from any effort at enforcing any arbitration award which may have already been issued regarding the reassignment of Sue Lieberman.

7. Reimburse the Pontiac School District for its actual costs, including attorney fees, if any, incurred in the collateral arbitration proceedings regarding the grievance filed by the Union over the reassignment of certified teacher Sue Lieberman, including interest at the statutory rate. This does not include costs or attorney fees incurred in connection with the litigation of this unfair labor practice charge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 27, 2013

[5] I am not recommending that the Commission order the posting of a notice by the Union, as such a remedy was not requested by the Employer and, regardless, a notice posting would not be appropriate under these circumstances.