STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

IONIA PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C12 E-094
Charging Party in Case No. CU12 C-013

-and-

IONIA EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent in Case No. CU12 C-013
Charging Party in Case No. C12 E-094
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Kevin S. Harty, for the Public Employer

Kalniz, Iorio & Feldstein, P.C., by Fillipe S. Iorio, for the Labor Organization

DECISION AND ORDER

On March 29, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter. In Case No. C12 E-094, the ALJ found that Ionia Public Schools (Employer) did not violate § 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, MCL 423.210(1)(a) and (e), by refusing to agree to a successor agreement containing prohibited subjects of bargaining. She recommended that we dismiss the charge. In Case No. CU12 C-013, the ALJ found that the Ionia Education Association, MEA/NEA, (Union) violated its duty to bargain in good faith under § 10(3)(c)[1] of PERA. The ALJ concluded that the Union unlawfully insisted, as a condition of its agreement on a successor contract, that the Employer agree to include provisions from the parties' expired contract that became prohibited subjects of bargaining after the passage of 2011 PA 103. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, the Union filed its exceptions to the ALJ's decision, a brief in support, and a request for oral argument on May 22, 2013. The Employer, after also requesting and receiving an extension of time, filed cross exceptions, a supporting brief, and a request for oral argument on June 20, 2013. After requesting and receiving two extensions of time, the Union filed its response to the Employer's cross exceptions and a request for oral argument on August 8, 2013.

[1] With the enactment of 2012 PA 349, that provision is now § 10(2)(d).

In its exceptions to the ALJ's Decision and Recommended Order, the Union contended that the ALJ erred by dismissing its charge against the Employer. The Union asserts that the ALJ erred by concluding that the Employer did not violate PERA when it conditioned its agreement to a successor contract on removing numerous provisions that had been in the expired contract from the successor agreement. The Union also asserts error in the ALJ's conclusion that the Union violated PERA by continuing to insist that the new contract include provisions on prohibited subjects of bargaining when the Employer unequivocally refused to agree to do so. The Union further contends that the ALJ erred by finding that its actions obstructed and impeded the bargaining process.

In its cross exceptions, the Employer contends that the ALJ erred by finding that a party does not violate PERA by demanding to bargain over prohibited subjects of bargaining unless the party insists upon including the prohibited subject as a condition of reaching a successor agreement. The Employer asserts that demanding to bargain over a prohibited subject, after the other party expresses unwillingness to bargain over that subject is a violation of the duty to bargain. The Employer also asserts that the ALJ erred by concluding that the Union did not present the Employer with bargaining proposals that explicitly included provisions from the expired contract that the Employer had identified as prohibited subjects.

After reviewing the record and submissions by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the parties' requests for oral argument are denied. We find Charging Party's exceptions to be without merit, but find the Employer's cross exceptions have some merit.

Factual Summary:

The Union represents a bargaining unit of teachers and other professionals employed by Ionia Public Schools. The parties' most recent collective bargaining agreement expired August 25, 2011. Around June 27, 2011, the parties began negotiations for a successor agreement. House Bill 4628, which proposed adding several prohibited subjects of bargaining to § 15(3) of PERA, had been passed by the House and was passed by the Senate a few days later. On July 13, 2011, the Employer provided the Union with a list of about forty-five provisions from eleven articles in the expiring collective bargaining agreement that it identified as being prohibited subjects of bargaining under House Bill 4628. Those provisions include: Article X, Teaching Assignments, which includes procedures for filling vacancies; Article XII, Vacancies and Transfers, which also includes procedures for filling vacant teaching positions; Article XIII, Layoff and Recall, which provides for layoffs on the basis of seniority, bumping rights, and recall procedures.

On July 19, 2011, House Bill 4628 was signed by the Governor and given immediate effect as 2011 PA 103. Public Act 103 amended § 15(3) of PERA by adding several provisions prohibiting collective bargaining between public school employers and representatives of certain school employees regarding such matters as: teacher placement, layoff, and recall; the employer's performance evaluation system; and merit pay.

The parties continued to bargain and reached agreement on some issues. According to the affidavit of the Employer's chief negotiator, Bruce Bigham, he sent an e-mail to the Union's chief negotiator, Amy Fuller, on August 1, 2011, restating the Employer's position regarding

prohibited subjects of bargaining and asking the Union to let the Employer know whether the Union disagreed with the Employer's identification of prohibited subjects of bargaining within the expiring collective bargaining agreement. According to Bigham's affidavit, during negotiations a few days later, Theresa Alderman, the Union's UniServ Director and a member of its bargaining team, informed the Employer that the Union would not bargain over prohibited topics and that the prohibited subjects covered in the expiring agreement would remain in the successor contract since it would be an unfair labor practice to bargain over those matters.

On August 18, 2011, the Employer further clarified its position to indicate the prohibition against bargaining over certain topics does not apply to those professional staff members who do not have a Michigan teaching certificate. The Employer reiterated its position that it would not enter into any successor agreement that contains provisions "embodying or pertaining to" prohibited subjects of bargaining. Further, the Employer stated:

> The district understands that the IEA has with specific intent declared an "impasse" on these issues on August 3, 2011 by way of illustration with (1) its insistence that any provisions of the present master agreement prohibited under Section 15(3) of the Act remain in the master agreement; (2) its inappropriate assertions that the severability language in Article 27(3) of the master agreement will dispose of this issue and (3) this impasse is further confirmed by its refusal to "discuss" the issue.

The parties continued to negotiate and reached tentative agreements on additional issues. On December 28, 2011, the Employer provided the Union with a "package" proposal that included proposals on issues still in dispute and incorporated the tentative agreements reached by the parties. The Employer's package proposal carried over some provisions from the expired contract that the Employer did not consider to be prohibited subjects. In its letter accompanying the proposal, the Employer again refused to include in the new contract any provisions from the expired contract pertaining to prohibited subjects of bargaining. In that letter, the Employer noted that it had previously identified prohibited subjects of bargaining and stated that the Union had not contested its identification of provisions containing prohibited subjects of bargaining. The Employer asserted that the Union's insistence on retaining such language from the expired contract was obstructing the bargaining process. The Employer requested that the Union respond to the Employer's proposal with a proposal of its own. According to Bigham, when the parties met on January 24, 2012, he requested that the Union's bargaining team respond to the Employer's December 28, 2011 proposal. Bigham states that Alderman indicated that the Union would not do so.

According to Alderman's affidavit, the Union maintained that the Employer would be taking unlawful unilateral action by removing contract provisions relating to alleged prohibited subjects of bargaining without the Union's agreement. She states that the Union informed the Employer that it would not bargain over prohibited subjects and the removal or alteration of language regarding prohibited subjects already existing in the contract would involve bargaining over prohibited subjects.

On February 22, 2012, Bigham sent an e-mail to the Union again requesting that the Union respond to the Employer's proposal. On February 28, 2012, the parties met again. According to Bigham, he again requested a response to the Employer's proposal and his request

was rejected. Bigham states that Alderman informed him that the content of the successor agreement would be identical to the content of the expired contract plus the tentative agreements reached during the course of bargaining. He asked Alderman whether the Union agreed with the Employer's designation of certain provisions from the expired contract as prohibited subjects of bargaining. Bigham further indicates that Alderman said that the Employer should not assume from the Union's failure to respond to the Employer's identification of prohibited subjects of bargaining that the Union concurred. Bigham states that Alderman said there was no reason to discuss the prohibited subjects if the purpose of the discussion was to remove the prohibited subjects from the contract.

The parties' negotiations continued with the Employer sending package proposals to the Union on June 8, 2012 and August 17, 2012. According to Bigham, as of the date of his affidavit, September 27, 2012, the Union had not provided a comprehensive written proposal for a successor contract and had continued to refuse to discuss the issue of the identification of prohibited subjects in the expired contract.

While the details of the Alderman and Bigham affidavits differ, the material facts recounted in the affidavits are consistent. Both affidavits state that the Employer refused to bargain over prohibited subjects that were in the expired contract and would not agree to include them in the successor contract. The affidavits are also consistent in indicating that the Union refused to bargain or discuss the prohibited subjects, but repeatedly insisted that the provisions in the expired contract were automatically part of the successor agreement and could not be removed.

Discussion and Conclusions of Law:

Effective July 19, 2011, Public Act 103 amended § 15(3) of PERA by adding subsections 15(3)(j) through (p), which prohibited public school employers and the unions representing certain school employees from bargaining over the subjects addressed by those subsections:

> (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.

(o) 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, MCL 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.

(p) Decisions about the development, format, content, and procedures of the notification to parents and legal guardians required under section 1249a of the revised school code, 1976 PA 451, MCL 380.1249a.

Provisions in Dispute

On exceptions, the Union contends that the ALJ erred by dismissing its charge against the Employer based on her conclusion that the Employer did not violate PERA by conditioning its agreement to a successor contract on not including provisions from the expired contract that the Employer contended were prohibited subjects of bargaining. The Union argues that it never agreed that the provisions identified by the Employer affect prohibited subjects of bargaining.

The Union has not indicated any basis for disagreeing with the Employer's identification of the provisions from the expired contract as prohibited subjects of bargaining. Among the provisions identified by the Employer as prohibited subjects of bargaining are: Article X, Teaching Assignments, which includes procedures for filling vacancies; Article XII, Vacancies and Transfers, which also includes procedures for filling vacant teaching positions; and Article XIII, Layoff and Recall, which provides for layoffs on the basis of seniority, bumping rights, and recall procedures. After the enactment of 2011 PA 103, provisions of the parties' expired collective bargaining agreement that applied to teacher placement, procedures for filling vacant teaching positions, and procedures relating to the layoff and recall of teachers are indisputably no longer mandatory subjects of bargaining. In fact, those provisions are now prohibited subjects of bargaining. *Pontiac Sch Dist*, 28 MPER 1 (2014); *Pontiac Sch Dist*, 27 MPER 60 (2014); *Ionia Pub Sch*, 27 MPER 55 (2014); *Pontiac Sch Dist*, 27 MPER 52 (2014). Therefore, the Employer is no longer required to comply with those terms of the expired contract and may not lawfully bargain over them. It is, therefore, evident that the Employer did not breach its duty to bargain by refusing to include in a successor agreement the provisions in the expired contract regarding teacher placement, procedures for filling vacant teaching positions, and procedures relating to the layoff and recall of teachers as such provisions relate to prohibited subjects of bargaining.

The provisions we have discussed are merely representative of the numerous provisions identified by the Employer as prohibited subjects of bargaining. The Union has not offered any basis for finding that the provisions we have discussed, or any other provisions identified by the Employer as being prohibited by 2011 PA 103, could lawfully be bargained. Therefore, we find no support for the Union's assertion that the ALJ erred by concluding that the Employer did not breach its duty to bargain by refusing to bargain over provisions that it considered to be prohibited subjects of bargaining. We agree with the ALJ that the Employer's refusal to bargain over provisions that it identified as prohibited subjects of bargaining pursuant to 2011 PA 103 is not a violation of the Employer's duty to bargain under § 10(1)(e) of PERA.

Carry Over of Provisions in Expired Contract Regarding Mandatory Subjects of Bargaining to Successor Agreement

The Union argues that the Employer violated PERA by insisting on "removal" of the provisions that the Employer identified as prohibited subjects of bargaining. The Union's position appears to be based on its assumption that provisions in the expired contract are automatically part of the parties' successor agreement unless the parties agree otherwise. The Union contends that mandatory subjects of bargaining carry over to the successor agreement and points to *City of Detroit*, 25 MPER 50 (2011) (no exceptions) and *Wayne Co*, 24 MPER 25 (2011) as support for this proposition. *City of Detroit* discusses the prohibition against midterm unilateral changes in mandatory subjects of bargaining. If a party makes a unilateral change in a mandatory subject of bargaining during the term of the contract, that party has violated its duty to bargain. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 565 (1998); *36th Dist Court*, 21 MPER 19 (2008). In this case, unlike *City of Detroit*, the parties' collective bargaining agreement had expired and the parties were in negotiations for a new contract. Under these circumstances, neither party may take unilateral action on a *mandatory* subject of bargaining unless the parties arrive at an impasse in their negotiations or there is a clear and unmistakable waiver. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277 (1978); *Wayne Co Gov't Bar Ass'n v Wayne Co*, 169 Mich App 480, 486 (1988); aff'g 1987 MERC Lab Op 230. In *Wayne Co*, 24 MPER 25 (2011), the Commission found that the

employer breached its duty to bargain by making changes in mandatory subjects of bargaining while the parties were in fact finding. Here, the Employer has not changed mandatory subjects of bargaining, it is merely seeking to avoid including *prohibited* subjects in a new agreement. The Union's reliance on *City of Detroit* and *Wayne Co*, 24 MPER 25 (2011) is misplaced. The Union appears to be trying to combine the law applicable to modification of an existing contract with the law regarding negotiation of a successor agreement. The law does not support the Union's assertion that contract provisions contained in an expired contract automatically carry over to the parties' successor agreement, whether those provisions involve mandatory or prohibited subjects of bargaining.

It is not unusual for parties with established bargaining relationships to begin negotiations for a new collective bargaining agreement with the understanding that provisions of the expired contract that are not raised in negotiations will be carried over to the successor agreement. As the ALJ explained, such an understanding is based on an express agreement or past practice of the parties and is a bargaining convention. There is nothing in the record to indicate that such an agreement is present here. Moreover, it is evident that if the parties had such an understanding in the past, it did not carry over to their negotiations in this case. It is undisputed that the Employer gave the Union clear and repeated notice that it would not agree to include prohibited subjects of bargaining in the successor contract. There is no factual or legal basis to support the Union's position that provisions in the expired contract must carry over to the successor agreement.

Based on its position that provisions in the expired contract automatically carry over to the successor agreement, the Union argues that those provisions in the expired contract that are now prohibited subjects of bargaining must remain part of the parties' agreement because the parties cannot bargain to remove them. Charging Party relies on *Sterling Faucet Co*, 108 NLRB 776 (1954) and *H Meuhlstein & Co*, 118 NLRB 268 (1957) to support its contention that it is lawful for the parties' contract to include provisions applying to prohibited subjects of bargaining if the parties do not enforce those provisions. However, the issue here is not whether an existing contract can contain provisions regarding prohibited subjects, but whether the parties can bargain over including such provisions in a new contract. 2011 PA 103 prohibits parties from bargaining over provisions regarding prohibited subjects. As we stated in *Calhoun Intermediate Ed Ass'n, MEA/NEA*, 28 MPER 26 (2014):

> Inclusion of the provisions [regarding prohibited subjects] 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.

Parties May Discuss Prohibited Subjects of Bargaining

The ALJ was correct in finding that the parties could discuss the subjects listed in 2011 PA 103. In *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), the Michigan Supreme Court examined whether amendments to PERA made by 1994 PA 112, which prohibited bargaining between public school employers and representatives of school employees over certain subjects, denied employees the right to voice their concerns over those subjects. The Court held that nothing in those provisions prohibited discussion. Thus, as the ALJ

indicates, it would have been permissible for the parties to discuss whether 2011 PA 103 prohibited bargaining over the provisions of the expired contract that the Employer considered to be prohibited subjects of bargaining.

The Union asserts in the brief in support of its exceptions that the Employer sought to unilaterally determine which provisions applied to prohibited subjects of bargaining. However, the Union does not deny that, on several occasions, the Employer sought to discuss with it whether it agreed with the Employer that the provisions identified by the Employer apply to prohibited subjects of bargaining. The Union does not deny that it declined to discuss whether the provisions that the Employer objected to including in the successor agreement were, in fact, prohibited subjects of bargaining. Although the Union contends that such a discussion would have been futile, its contention is contradicted by the Employer's communications on August 1, 2011, December 28, 2011, and February 28, 2012, which either asked the Union to inform the Employer of any disagreement, or confirm the Union's agreement, with the identification of certain provisions of the expired contract as prohibited subjects of bargaining. Moreover, the Union fails to articulate a rationale to support its asserted belief that the provisions in question did not encompass prohibited subjects of bargaining. The Union's refusal to discuss these issues with the Employer during negotiations calls into question whether the Union was bargaining in good faith.

Discussion of the issues affecting the parties' proposals is part of the bargaining process. In determining whether a party has violated its statutory duty to bargain in good faith we must examine the totality of the party's conduct to determine whether it has "actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53-54 (1974); *Oakland Cmty Coll*, 2001 MERC Lab Op 273; 15 MPER 33006. Although the Employer had no duty to bargain over prohibited subjects, it repeatedly asked the Union to indicate whether the Union agreed or disagreed with its identification of provisions from the expired contract as prohibited subjects of bargaining. The Union's repeated refusal to discuss that issue as well as its baseless insistence that provisions from the expired contract automatically carried over into the new contract indicate that the Union had neither an open mind nor a sincere desire to reach agreement. In short, the Union's actions were simply an attempt to delay and obfuscate the bargaining process. See e.g. *Unionville-Sebewaing Area Sch*, 1988 MERC Lab Op 86, 90.

Parties May Not Bargain over Prohibited Subjects of Bargaining

We agree with the Employer that the ALJ erred by stating that the parties could bargain over the subjects prohibited by 2011 PA 103. While this does not change the result, the decision is modified in this regard. In *Michigan State AFL-CIO* at 380, the Court explained that the amendments to PERA contained in 1994 PA 112 "prohibit public school employers from collectively bargaining over these subjects with their employees." The Court went on to state:

> Collective bargaining as a process requires both parties to confer in good faith-to listen to each other. . . . 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." *Id*.

The Union also asserts error in the ALJ's conclusion that the Union violated PERA by continuing to insist that the new contract include provisions on prohibited subjects of bargaining, when the Employer unequivocally refused to agree to do so. The Union further contends that the ALJ erred by finding the Union's actions obstructed and impeded the bargaining process. The Employer, on the other hand, contends that the ALJ erred by finding that a party does not violate PERA by demanding to bargain over prohibited subjects of bargaining unless the party insists upon a prohibited subject as a condition of reaching a successor agreement.

The ALJ held "it is a party's insistence on a nonmandatory subject – illegal, prohibited, or permissive - as a condition of agreement on a contract that violates its duty to bargain in good faith." We agree with the ALJ, as we did in *Calhoun Intermediate Ed Ass'n, MEA/NEA*, 28 MPER 26 (2014), that insistence on including a prohibited subject of bargaining as a condition of reaching a successor agreement is a violation of the duty to bargain in good faith. As we indicated in *Calhoun*, insisting that provisions regarding prohibited subjects of bargaining be included in the successor agreement obstructs and impedes the bargaining process. We, therefore, agree with the ALJ that the Union's actions violated the Union's duty to bargain under § 10(3)(c) of PERA

The ALJ relied on the following language from *The Guard Publishing Co*, 351 NLRB 1110, 1120 (2007) which explained the effect of bargaining over an illegal subject:

> 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 F2d 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).

In *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), the Michigan Supreme Court held that "In effect, the Legislature simply classified the disputed subjects as illegal subjects of collective bargaining." However, the National Labor Relations Board's discussion of illegal subjects of bargaining in *The Guard Publishing Co*, and in *Sheet Metal Workers Local 91 (Schebler Co*), 294 NLRB 766, 773 (1989), cited therein, makes it clear that under the National Labor Relations Act (NLRA), the parties may propose or bargain over an unlawful subject without violating the NLRA. Section 15(3) of PERA, on the other hand, expressly prohibits bargaining on the subjects enumerated therein.

In most cases, such as the *Calhoun* case, and other cases in which we have considered § 15(3)[2], it is not necessary to distinguish between illegal subjects of bargaining and prohibited subjects of bargaining. The Employer's cross exceptions in this case require us to distinguish between illegal subjects of bargaining under the NLRA and prohibited subjects of bargaining

[2] See, for example, *Ionia Pub Sch*, 27 MPER 55 (2014); *Pontiac Sch Dist*, 27 MPER 52 (2014), *Lakeview Cmty Sch*, 25 MPER 37 (2011).

under PERA. 2011 Act 103 is very clear in its prohibition of bargaining over the subjects delineated therein. Where a public school employer has clearly and unambiguously indicated its unwillingness to bargain over prohibited subjects of bargaining, as the Employer did in this case, it is a breach of the duty to bargain in good faith for a union to demand bargaining on those subjects. See *Michigan State AFL-CIO* at 380. Therefore, even if the Union had not made inclusion of prohibited subjects a condition of reaching agreement, a demand by the Union to bargain over those subjects, where the Employer notified the Union of its unwillingness to do so, would be a breach of the Union's duty to bargain in good faith.

On cross exceptions, the Employer asserts that the ALJ erred by concluding that the Union did not present the Employer with bargaining proposals that explicitly included provisions from the expired contract that the Employer identified as prohibited subjects. The ALJ found:

> [T]he Union did not present the Employer with bargaining proposals that explicitly included provisions from the expired contract that the Employer had identified as prohibited subjects. It also did not explicitly acknowledge . . . that provisions from the expired contract which the Employer had identified as prohibited subjects were, in fact, prohibited subjects. However, . . . the Union did not agree to exclude the identified provisions – or any of the identified provisions – from the successor agreement. The Union here avoided explicitly proposing that the agreement include language covering prohibited topics by making no proposals at all on the topics the Employer had identified as prohibited. Instead, it told the Employer that the removal or alteration of any language dealing with prohibited topics in the expired agreement would involve bargaining over those topics, and that this removal or alteration would be unlawful. The Union continued to maintain this position through mediation and up to and after the Employer filed the unfair labor practice charge in this case. I find, on these facts, that the Union . . . insisted as a condition of its agreement on a contract that the Employer agree to include provisions on prohibited topics. . . . I conclude that the Union's insistence on these prohibited subjects violated its duty to bargain in good faith.

The Employer asserts that, when pressed, the Union was explicit in stating that any prohibited subjects appearing in the expired contract must remain unaltered in the successor agreement. The Employer describes this discussion as an explicit statement of the Union's bargaining proposal. It is apparent that the Union sought to avoid being accused of demanding bargaining over prohibited subjects by refusing to offer written proposals regarding those subjects and by contending that provisions from the expired contract are automatically part of the successor agreement. The Union's unwavering insistence that provisions regarding prohibited subjects carried over to the successor agreement obstructed and impeded the bargaining process and violated the Union's duty to bargain in good faith. Whether the Union's demands to include prohibited subjects of bargaining in the successor agreement were explicit or implicit, it is clear from the record that the Union insisted as a condition of agreement that provisions affecting prohibited subjects of bargaining must be included in the successor contract. In either case, we agree with the ALJ that the Union violated its duty to bargain in good faith by insisting that provisions regarding prohibited subjects of bargaining that were in the expired contract be included in the parties' successor agreement.

For the foregoing reasons, we find the Employer did not violate its duty to bargain by refusing to include provisions regarding prohibited subjects of bargaining in the successor agreement. We also find that the Union obstructed and impeded the bargaining process by insisting that prohibited subjects of bargaining be included in the successor agreement and thereby violated its duty to bargain. The ALJ's decision is affirmed as modified herein.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

For the reasons stated in this decision, the Commission adopts as its Order the Order recommended by the ALJ.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 18, 2014

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **IONIA 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 2010-2011 collective bargaining agreement with the Ionia Public Schools (the School District) that the School District agree to include provisions on prohibited bargaining subjects.

WE WILL NOT bargain in bad faith, and obstruct and impede the bargaining process, by continuing to insist that the parties' successor agreement include provisions dealing with nonmandatory subjects of bargaining after the School District unequivocally refused to bargain over these provisions.

WE WILL communicate to the School District, in writing, our willingness to enter into a collective bargaining agreement that does not include any provision, including any provision included in the 2010-2011 agreement, pertaining to a prohibited subject of bargaining.

WE WILL bargain in good faith with the School District over wages, hours and terms and conditions of employment for a successor to our 2010-2011 collective bargaining agreement.

IONIA 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 C-013

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

IONIA PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C12 E-094/Docket No. 12-000794-MERC
Charging Party in Case No. CU12 C-013/Docket No. 12-000496-MERC

-and-

IONIA EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent in Case No. CU12 C-013/Docket No. 12-000496-MERC
Charging Party in Case No. C12 E-094/Docket No. 12-000794-MERC.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Kevin S. Harty, for the Public Employer

Kalniz, Iorio & Feldstein, P.C., by Fillipe S. Iorio, for the Labor Organization

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

On March 22, 2012, the Ionia Public Schools (the Employer) filed the unfair labor practice charge in Case No. CU12 C-013 with the Michigan Employment Relations Commission (the Commission) against the Ionia Education Association (the Union), the collective bargaining representative of its employees possessing teaching certificates and certain other professional employees. The charge, as amended on May 30, 2012, 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, MCL 423.210(3)(c), by continuing to propose and/or insist on the retention or inclusion in the parties' successor collective bargaining agreement of provisions from an expired agreement which pertain to topics that have now become prohibited subjects of bargaining. On May 11, 2012, the Union filed a charge, Case No. C12 E-094, against the Employer. The Union's charge, a mirror image of the Employer's charge, alleges that the Employer violated §§10(1)(a) and (e) of PERA, MCL 423.210(1)(a) and (e), by conditioning its agreement to the terms of a new collective bargaining agreement on the wholesale revision or removal of provisions contained in the expired agreement.

Pursuant to §16 of PERA, both charges were assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System. On June 14, 2012, the Employer filed a motion for summary dismissal of the charge filed against it in Case No. C12 E-094, asserting that the charge should be summarily dismissed under Rule 165(2)(d) of the Commission's

General Rules and Regulations, 2002 AACS, R 423.151, because it failed to state a claim. Union filed a brief in opposition to this motion on July 20, 2012. I heard oral argument on this motion on September 5, 2012.

On September 4, 2012, the Union filed a motion for summary dismissal of the charge in Case No. CU12 C-013 under Rule 165(2)(d). However, the Union relied in its motion on facts set forth in affidavits from Union UniServ Director Theresa Alderman and Union chief negotiator Amy Fuller, as well as in documents which it attached to the motion. I will, therefore, treat the motion as brought instead under Rule 165(2)(f), i.e. as an assertion that there are no genuine issues of material fact and the Union is entitled to judgment as a matter of law. The Employer filed a cross-motion for summary disposition under Rule 165(2)(f) on October 3, 2012, to which the Union replied on November 26, 2012. The Employer's motion also included an affidavit from its chief bargaining spokesperson, Bruce Bigham, and copies of letters, emails and other documents sent to the Union by the Employer during bargaining. The Union's motion also included copies of written tentative agreements on individual contract provisions reached during bargaining and initialed and dated by both parties. I heard oral argument on the motions in Case No. CU12 C-013 on January 7, 2013.

Case Nos. C12 E-094 and CU12 C-013 were originally consolidated for hearing. I severed them after the Employer filed its motions for summary disposition in June 2012. However, because the issues are so closely related, I have consolidated them for decision. After a review of the pleadings filed by both parties, I conclude that there are no material facts in dispute. Based on facts not in dispute set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

Except as specifically noted, the following facts are not in dispute. The most recent collective bargaining agreement between the parties expired on August 25, 2011. The parties began negotiations for a successor agreement on or about June 27, 2011. The Employer's chief negotiator was Bruce Bigham. The Union's chief negotiator was teacher Amy Fuller. Union UniServ Director Theresa Alderman was also a member of the Union's bargaining team.

On July 19, 2011, the Legislature gave immediate effect to amendments to §15 of PERA that made 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. (See §15(3)(k) of PERA.)

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. (See §15(3)(l).)

4. Decisions about classroom observations or the impact of those decisions. (See §15(3)(n).)

5. Discipline and discharge decisions involving employees covered by the Teacher Tenure Act. (See §15(3)(m).)

6. Decisions pertaining to merit pay for teachers. (See 15(3)(o).)

On July 13, 2011, 2011 PA 103 had been passed by the Legislature, but not yet signed by the Governor. On that date, the Employer presented the Union with a document identifying provisions from the parties' 2010-2011 collective bargaining agreement which, according to the Employer, pertained to topics made prohibited subjects of bargaining by 2011 PA 103. The document identified certain entire articles in the expired agreement as being impacted by the amendments. These were Article X, "Teaching Assignments;" Article XII, "Vacancies and Transfers;" Article XIII, "Layoff and Recall;" Article XIV, "Teacher Evaluation;" and Article XXII, "Substance Abuse." It also cited portions of a number of other articles, including Article V, Section 4, which stated that employees could not be disciplined without just cause. In total, the Employer identified approximately 45 sections from eleven different articles in the expired agreement as pertaining to prohibited subjects. The July 13 document was titled "Preliminary List" and included this explanatory paragraph:

> *This is not to be construed as a proposal*. Based upon a review of the amendments to the Public Employment Relations Act (attached) prohibited topics list and given each marked area falls within the "decision or impact of the decision" on the bargaining unit member and/or union, it is the belief of the district that all the provisions highlighted in red are prohibited by operation of law upon expiration of the master agreement. The exclusion of these provisions is required as a matter of law and is not the subject of negotiations or ratification. Given the issues are prohibited topics, there would be no future grievance or arbitration access on issues directly or indirectly related to these issues.[3] [Emphasis added].

The parties held additional bargaining sessions in late July. By the end of July, they had reached tentative agreements on a calendar for the 2011-2012 school year, revisions to the recognition clause, an article entitled "Placement on the Salary Schedule," the elimination of a letter of agreement that had been part of the expired contract, and new language for Article XXII, the "Substance Abuse" provision.

On August 1, 2011, the Employer sent the Union a revised version of the July 13, 2011 document. This document also included the explanatory paragraph set out above. The parties

[3] The Employer's charge in Case No. CU12 C-013 originally alleged that the Union violated its duty to bargain by seeking arbitration of prohibited subjects. However, the parties resolved this issue before the charge in CU12 C-013 was amended in March 2012.

held a negotiation session on August 3. According to an affidavit executed by Bigham, Alderman told the Employer at this meeting that the Union would not bargain over prohibited topics and, therefore, any prohibited content from the expired agreement would necessarily remain in the successor agreement. According to Bigham, she also said that it would be an unfair labor practice for either party to insist that the prohibited topics be removed from the successor agreement. According to an affidavit executed by Alderman, at some time during the negotiations, although not necessarily on August 3, the Union told the Employer that the Union would not bargain over prohibited subjects, and that this included bargaining over the removal of language that was allegedly affected by the PERA amendments. According to Alderman, the Union explained that the removal or alteration of any language dealing with prohibited topics already existing in the contract would involve bargaining over those topics. According to Alderman, the Union also told the Employer that the Employer would be taking unlawful unilateral action by removing contract provisions relating to alleged prohibited subjects without the Union's concurrence. I find no material difference between Bigham's and Alderman's accounts of the position taken by the Union. It is also clear, from Alderman's affidavit, that the Union's position on this issue did not change during the course of negotiations.

On August 18, 2011, the Employer gave the Union yet another document identifying the provisions in the expired contract which it concluded were impacted by 2011 PA 103. The document included the following prefatory language:

> Upon closer review and examination with legal counsel of the prior draft of this document, it now appears that the prohibited topics may not apply to those "professional staff members" in the bargaining unit who do not possess a Michigan teaching certificate, i.e. (licensed counselors). This document has been amended in recognition of this differential. Counselors with teaching certificates with an NT endorsement are considered as "certified teachers" along with all certified classroom teachers for purposes of this document. It is the belief that those differentiations noted throughout this document represent the "status quo" for these "professional staff members" defined in Article 2(4) of the document. Should future MERC or court rulings determine that the provisions for "professional staff members" are prohibited topics in the same manner as those covering "certified teachers," the district reserves the right to exercise all its legal rights.
>
> *This document is not to be construed as a proposal.* Nothing in this document should be regarded as indicating that the Board of Education suggested or otherwise intends to continue any provisions of the 2010-2011 master agreement that pertains to prohibited subjects in the successor collective bargaining agreement.
>
> *The removal of these provisions is required as a matter of law and is not the subject of negotiations or ratification. As a matter of law, there is no future access to the grievance procedures for items directly or indirectly related to those issues.*

> *The IEA is hereby also notified that the Board of Education will not enter into or execute any successor collective bargaining agreement which contains provisions embodying or pertaining to any prohibited topics of bargaining set forth in Section 15(3) of the Act.*
>
> The district understands that the IEA has with specific intent declared an "impasse" on these issues on August 3, 2011 by way of illustration with (1) its insistence that any provisions of the present master agreement prohibited under Section 15(3) of the Act remain in the master agreement; (2) its inappropriate assertions that the severability language in Article 27(3) of the master agreement will dispose of this issue and (3) this impasse is further confirmed by its refusal to "discuss" the issue.[Emphasis added]

The Union did not challenge the Employer's designation of provisions in the 2010-2011 contract as involving prohibited subjects. According to the affidavit of Union chief spokesperson Amy Fuller, the Union concluded that any discussion of whether specific provisions in the expired contract involved prohibited subjects of bargaining would have been futile, since the Employer had made it clear that it had identified the prohibited subjects, had said that the prohibited subjects would be "dropped" from the contract, and had stated that it would not ratify a contract that contained any provisions that it had marked as prohibited.

The parties held several bargaining sessions in September 2011. Between the beginning of August and the end of September, the parties reached tentative agreements on a number of additional contract provisions, including those dealing with teaching hours, class size, leave days and the duration of the agreement. However, there remained significant disagreement on other issues, including issues acknowledged to involve mandatory subjects. The parties had three sessions with a Commission-appointed mediator in late October and in December but were unable to resolve those disagreements.

On December 28, 2011, the Employer sent the Union a comprehensive "package" proposal for the new contract. The proposal included proposals on issues still in dispute, including wages and health insurance; incorporated all tentative agreements reached by the parties; and carried over certain provisions from the expired contract that the parties had not discussed but the Employer believed were not affected by 2011 PA 103. It also reflected the Employer's position on prohibited topics, e.g., the Employer's December 28 proposal contained no article entitled "Teaching Assignments," and the articles dealing with evaluations, layoff and recall, and vacancies and transfers specifically restricted their application to non-teacher professional staff members. In an accompanying letter to the Union, Bigham noted that 2011 PA 103 now prohibited bargaining over a number of areas which were embodied in the expired agreement, that these "areas of prohibition" had been specifically identified in the August 18, 2011 document and "those areas had not been contested by the Association." In the letter, the Employer reiterated its refusal to include in the new contract any content from the expired contract that addressed prohibited subjects of bargaining, and stated that the Union's insistence that this material be retained or included was obstructing the bargaining process. The December 28 letter also asked the Union to respond to the Employer's package proposal with a comprehensive proposal of its own.

On February 22, the Employer sent the Union an email in which it stated that "all prohibited topics were removed effective last August when the master agreement expired," and that the Employer was reiterating its refusal to enter into "negotiations" over the prohibited topics. The email included this paragraph:

> We had invited discussion over those topics last summer which was summarily dismissed by Ms. Alderman under the claimed auspices that the topics were prohibited so neither party can take them out of the contract. This statement is inconsistent with years of well established case law. Ms. Alderman further stated the severability language currently in the master agreement would take care of any issues during the terms of a new contract with regard to those prohibited topics.[4] By complete contrast to Ms. Alderman, Mr. Cairns recently claimed during the processing of two grievances and at other times that all the prohibited topics are still in the agreement and are enforceable. He also stated that they must be "negotiated out."

The email stated "It has been clear for months that the IEA fully concurs with the scope of the adjustments made and identified in the document dated August 18, 2012."

The parties met again on February 28, 2012. According to Bigham, the Employer reiterated that it would not agree to a contract unless the Union agreed to delete and revise the provisions from the expired contract that the Employer had identified as addressing prohibited subjects of bargaining. According to Bigham, he asked Alderman whether the Union agreed with the Employer's designation in the August 18, 2011 of certain provisions in the expired agreement as prohibited subjects. According to Bigham, Alderman told him that he should not assume from the Union's lack of response that the Union concurred, but that there was no reason to have any discussion over the prohibited subjects if the purpose of that discussion was to remove the prohibited subjects from the contract. The Union neither confirmed nor denied that Alderman made these statements at this meeting.

The parties met again with the mediator in late April and early May 2012. On June 8, 2012, the Employer sent the Union another package proposal and asked the Union to present a package proposal of its own. The Employer's proposal was accompanied by a letter that included the following paragraph:

> The District has consistently articulated its objection to the perpetuation of any prohibited content from the expired 2010-2011 Master agreement, as well as to the inclusion of any prohibited or illegal subject matter within the successor contract. The District has also conveyed its disagreement with the Association's reasoning that by simply side-stepping any discussion over the content of the successor contract relative to the prohibited subjects, the provision of the expired

[4] The clause provided that "if any provision of this Agreement or any application of the Agreement to any employee or group of employees shall be found contrary to law, then such provision or application shall not be deemed valid and subsisting, except to the extent permitted by law' but all other provisions or applications shall continue in full force and effect."

> predecessor contract pertinent to the prohibited subject are thereby perpetuated. The District's concern over the Association's position in this matter has been confirmed by statements made by the Association's President that the prohibited subject matter survive the expiration of the collective bargaining agreement and must be "negotiated" out of the contract.

The letter reiterated that the Employer would not enter into any agreement having content within the prohibited subjects of bargaining as identified under Section 15(3) of PERA.

The parties continued to meet with the mediator, and the Employer made another package proposal on August 17, 2011. As of the close of the record in these cases in January 2013, neither party had changed its position on the inclusion in the new contract of the provisions identified by the Employer as prohibited subjects of bargaining. The parties, however, also continued to have substantive disagreements over issues clearly recognized as mandatory subjects of bargaining, including wages and health insurance.

Discussion and Conclusions of Law:

The Union's Charge against the Employer

2011 PA 103 radically altered the landscape of bargaining for public school employers and the unions representing their teachers. Not only did these amendments make a large number of topics that had been recognized as mandatory subjects prohibited subjects of bargaining, these topics included issues, such as evaluation, layoff and recall by seniority, and just cause for discipline, that were "core" issues for teachers and their unions and were routinely, if not universally, covered in collective bargaining agreements. After 2011 PA 103, therefore, many public school employers and their teachers, like the parties here, found themselves for the first time with expired or expiring collective bargaining agreements containing large numbers of provisions addressing issues that were mandatory subjects of bargaining when the agreements were negotiated but had arguably now become prohibited subjects.

Since §15 of PERA, in its original form, was patterned on §8(d) of the National Labor Relations Relation Act (NLRA), 29 USC §158(d), the Commission and courts have traditionally looked to precedents under the NLRA to determine the bargaining rights and obligations of parties under PERA. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 58 (1974). When the term "prohibited bargaining subject" was introduced to PERA by amendments to §15 made by 1994 PA 112, the Court of Appeals construed this phrase to be synonymous with "illegal subject of bargaining," a concept recognized under the NLRA. In *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996), the Court of Appeals stated at 486-487:

> Generally subjects of collective bargaining may be classified as mandatory, permissive and illegal. *Detroit Police Officers Ass'n.* 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 *Detroit 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.

There is not a perfect fit, however, between "illegal subjects" under the NLRA and the matters made prohibited subjects of bargaining in PERA. As §15(4) and §15(11) of PERA confirm, "prohibited subjects" under PERA are primarily subjects which the Legislature has concluded should be left to the sole discretion of the public employer. By contrast, an "illegal subject" under the NLRA is generally one where, if a provision on this topic were included in the contract and the contract clause enforced, one or both parties to the contract would violate some other provision of the NLRA or external law. Neither party has cited to me, nor have I discovered, any case arising under the NLRA where the parties entered bargaining with an expired contract containing potentially dozens of illegal contract clauses.

There was, therefore, no clearly marked path for the parties in this case to follow when 2011 PA 103 was passed around the time they began negotiations for a successor collective bargaining agreement. In July 2011, the Employer gave the Union a document identifying a large number of provisions in their soon-to-expire contract as addressing soon-to-be prohibited subjects. An explanatory paragraph stated that the Employer believed these provisions "are prohibited by operation of law upon expiration of the master agreement." It also stated that "the exclusion of these provisions is required as a matter of law and is not the subject of negotiations or ratification." It is not clear to me exactly what the Employer meant by these statements. That is, I am not sure whether the Employer meant that it did not intend to adhere to these provisions after the contract expired and during negotiations, whether it meant that it would not agree to include them in the successor agreement, or both. It is also not clear to me why the Employer said that the document was not a proposal. However, it is not necessary for me to interpret hat the Employer said in the documents it gave the Union on July 13 and August 1. The Union's

charge alleges that the Employer unlawfully conditioned its agreement on a new contract on the "removal" (see discussion below) from the successor agreement of a large number of provisions in the expired contract which the Employer had identified as prohibited subjects of bargaining. On August 18, 2011, the Employer notified the Union that "it would not enter into or execute any successor collective bargaining agreement which contains provisions embodying or pertaining to any prohibited topics of bargaining set forth in Section 15 of the Act." It is clear from that statement that the Employer did condition its agreement on a new contract on the "removal" of these provisions.

The Union and the Employer, however, disagree over whether this violated the Employer's duty to bargain. The Union took the position at the bargaining table that since the parties could not lawfully bargain over prohibited topics, they could not agree to "remove or alter" any provision in their old contract covering a prohibited topic. As discussed in my decision and recommended order in *Calhoun Intermediate Education Association,* (Case No. CU12 B-009, issued August 24, 2012 and pending on exceptions before the Commission), and below, the fact that topics are illegal or prohibited subjects of bargaining does not make it unlawful for parties to discuss or even bargain about them. Rather, it is a party's insistence on a nonmandatory subject – illegal, prohibited, or permissive - as a condition of agreement on a contract that violates its duty to bargain in good faith. *Detroit Police Officers Ass'n; NLRB v Wooster Div of Borg-Warner*, 356 US 342 (1958); *The Guard Publishing Co*, 351 NLRB 1100 (2007). Therefore, it would not have been a violation of PERA for the parties in this case to have discussed whether the Employer had correctly identified those provisions in the expired contract that had been made prohibited subjects of bargaining by 2011 PA 103. In addition, as I stated in *Calhoun*¸ there is no authority for the proposition that parties may not lawfully agree that their collective bargaining agreement <u>not</u> include a provision on an illegal or prohibited topic.

The Union also took the position that the Employer would commit an unfair labor practice if it "removed" contract provisions related to prohibited subjects without the Union's agreement. In its motion, the Union also asserts that the parties had no obligation to remove prohibited language from their agreement, and that any language within that contract that pertained to a prohibited subject was simply unenforceable, citing *Sterling Faucet Co*, 108 NLRB 776 (1954). In this argument, the Union seems to conflate modification of an existing agreement with negotiation of a successor agreement. In this case, the parties' existing contract expired on August 25, 2011. The Employer did not propose to modify or delete any language in that agreement, although it did indicate its intention not to adhere to provisions in the agreement which it deemed prohibited after the contract expired. Rather, the Employer notified the Union that it would not henceforth bargain over, or enter into any new agreement with a provision relating to, a prohibited subject of bargaining. Whether the Employer and/or Union would have committed an unfair labor practice had they agreed to carry over provisions into their new agreement that they agreed were unenforceable is simply not an issue here. The Employer clearly, and early in the negotiations, made it clear that it would not agree to this.

It is true that many parties with established bargaining relationships approach the bargaining table with the understanding – based either on an explicit ground rule or on their practice during past negotiations – that a provision from their predecessor contract which is not

raised by either party during negotiations will automatically carry over to become part of the new agreement. However, this is merely a bargaining convention, not a legal requirement. If the parties do not mutually agree that a term from their expired contract will carry over into their new contract, it will not. In this case, the parties never agreed to carry over the provisions identified by the Employer as prohibited subjects into their new contract. Therefore, characterizing the Employer's position as an insistence that certain provisions be "removed" from a contract which had not yet been formed is not strictly accurate. The Employer's position is better described, I find, as an insistence that the parties' successor agreement not include any provisions on prohibited subjects. I agree with the Employer that, in taking this position, it was asserting its right not to bargain over prohibited subjects.

The Union alleges that the Employer unlawfully claimed the right to solely determine what was or was not a prohibited subject when it proposed the deletion of "vast" sections of the expired contract and stated that it would not bargain over these provisions. I agree with the Union that the law does not vest the Employer with the unfettered discretion to define what constitutes a prohibited subject, or identify contract provisions that are prohibited subjects. However, what is and is not a prohibited subject under §15 of PERA, as amended, is not a subject over which the Employer has a duty to bargain. Rather, it is a question of statutory interpretation. To the extent that the statutory language is ambiguous, it is the role of the Commission and the courts to interpret it. I find that when the Employer identified the provisions in the expired contract that it believed had become prohibited subjects, it was stating its position as to how the amendments in 2011 PA 103 should be interpreted. If the Union disagreed with the Employer's interpretation of the statute, the Union was free to challenge it by countering with its own interpretation or filing an unfair labor practice charge asserting that the Employer was unlawfully refusing to bargain over mandatory subject(s) of bargaining. However, it did neither. I conclude that the Employer in this case did not violate §§10(1)(a) and (c) of PERA by conditioning its agreement on a successor collective bargaining agreement on the "removal," i.e. noninclusion in the new agreement, of provisions in the expired agreement that the Employer had identified as prohibited subjects of bargaining.

The Employer's Charge against the Union

The Employer's charge alleges that the Union violated its duty to bargain in good faith by insisting and/or continuing to propose that provisions dealing with prohibited subjects be included in the successor contract. My decision in *Calhoun* included the following quotation from *The Guard Publishing Co*, 351 NLRB 1100 (2007), in which 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).

I also found, as follows,

> 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.[5]

In *Calhoun,* the Union made a series of proposals over the course of negotiations that explicitly included provisions from the expired contract that it acknowledged 2011 PA 103 had made prohibited subjects of bargaining. However, it never stated, in so many words, that it would not agree to a contract that included these topics. The Union in that case denied that it had insisted on the inclusion of any prohibited topic in the successor agreement as a condition of its agreement on the contract. However, the Union continued to include the provisions in its proposals after the Employer accused it of bargaining in bad faith, throughout mediation, and after the Employer had filed an unfair labor practice charge alleging that the Union was unlawfully insisting on these provisions. The Union in *Calhoun* attempted, without success, to convince the Employer to agree to include the provisions in the successor agreement by arguing that these provisions would be unenforceable unless or until 2011 PA 103 was overturned by the courts or legislative action. Citing *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), I found, on these facts, that the Union in *Calhoun* had effectively insisted on the inclusion of these provisions as a condition of its agreement on a new contract. I also concluded that the fact that the parties continued to bargain, and that there were other important issues involving mandatory subjects that remained to be resolved, did not mean that the Union in that case had not insisted to impasse on the inclusion of nonmandatory topics.

In the instant case, the Union did not present the Employer with bargaining proposals that explicitly included provisions from the expired contract that the Employer had identified as prohibited subjects. It also did not explicitly acknowledge, as the Union did in *Calhoun,* that provisions from the expired contract which the Employer had identified as prohibited subjects were, in fact, prohibited subjects. However, like the Union in *Calhoun,* the Union did not agree

[5] 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. See, e.g., *Warren Con Schs and AFSCME Local 1346,* 19 MPER 37 (2006).

to exclude the identified provisions – or any of the identified provisions – from the successor agreement. The Union here avoided explicitly proposing that the agreement include language covering prohibited topics by making no proposals at all on the topics the Employer had identified as prohibited. Instead, it told the Employer that the removal or alteration of any language dealing with prohibited topics in the expired agreement would involve bargaining over those topics, and that this removal or alteration would be unlawful. The Union continued to maintain this position through mediation and up to and after the Employer filed the unfair labor practice charge in this case. I find, on these facts, that the Union here, like the Union in *Calhoun*, insisted as a condition of its agreement on a contract that the Employer agree to include provisions on prohibited topics. As I did in *Calhoun*, I conclude that the Union's insistence on these prohibited subjects violated its duty to bargain in good faith.

I also agree with the Employer that the Union's insistence on the retention of prohibited subjects in the new agreement has obstructed and impeded the bargaining process. As I held in *Calhoun*, because the Union has continued to insist that these subjects be part of the new agreement, the Employer has no way to assess whether the position 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 agreeing to include in the new contract the provisions from the expired contract that the Employer has identified as prohibited subjects. By continuing to insist that the new contract include provisions on nonmandatory subjects of bargaining after the Employer unequivocally refused to agree to do so, the Union impeded the resolution of the parties' contract dispute by obscuring the true nature of that dispute.

Based on these conclusions of law, I recommend that the Commission grant the Employer's motion in Case No. C12 E-094 and that it issue an order dismissing that charge. I also recommend that the Commission grant the Employer motion for summary disposition in Case No. CU12 C-013, and that it 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 insist that the parties' successor agreement include provisions dealing with nonmandatory subjects of bargaining after the Employer unequivocally refused to bargain over these proposals.

RECOMMENDED ORDER

Respondent Ionia 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 a successor to its 2010-2011 collective bargaining agreement with the Ionia Public Schools (the 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 insist that the parties' successor agreement include provisions dealing with nonmandatory subjects of bargaining after the School District unequivocally refused to bargain over these provisions.

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

a. Communicate to the School District, in writing, its willingness to enter into a collective bargaining agreement that does not include any provision, including any provision included in the 2010-2011 agreement, pertaining to a prohibited subject of bargaining.

b. Bargain in good faith with the School District over wages, hours and terms and conditions of employment for a successor to the parties' 2010-2011 agreement.

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 charge in Case No. C12 E-094, filed by the Ionia Education Association, MEA/NEA against the Ionia Public Schools, is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 29, 2013