STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

RIVER ROUGE SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C09 J-202

-and-

RIVER ROUGE EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Lusk & Albertson, PLC, by Robert T. Schindler, for Respondent

White, Schneider, Young & Chiodini, PC, by Erica Thorn, for Charging Party

DECISION AND ORDER

On October 3, 2014 Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent River Rouge School District did not violate its duty to bargain in good faith under § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 when it temporarily assigned substitute teachers to fill the positions of laid off teachers awaiting recall. The ALJ concluded that even if Respondent breached the contract, its breaches were isolated instances that did not significantly impact the bargaining unit; therefore, Respondent did not repudiate the contract. The ALJ recommended that we dismiss the charge in its entirety. The Decision and Recommended Order on Summary Disposition was served on the parties in accordance with § 16 of PERA.

On October 23, 2014, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and requested oral argument. On November 7, 2014, Charging Party filed a supplement to its exceptions. After requesting and receiving an extension of time, Respondent filed cross exceptions, a supplement to its cross exceptions, and a brief in support of the ALJ's Decision and Recommended Order on November 13, 2014.[1]

The Commission finds that oral argument will not materially assist us in making our decision. Accordingly, Charging Party's request for oral argument is denied.

[1]Although the title of Respondent's answer to Charging Party's exceptions is "cross exceptions," Respondent does not take exception to any of the ALJ's findings. Instead, Respondent claims that the ALJ was correct in her findings and requests that we affirm the Decision and Recommended Order of the ALJ in its entirety.

In its exceptions, Charging Party argues that the ALJ erred by finding that Respondent did not repudiate the layoff and recall provisions of the contract. Charging Party also contends that the ALJ's finding that Respondent's failure to timely recall teachers was isolated and had no significant impact on the bargaining unit was in error. We have carefully reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ and repeat them here only as necessary.

The 2009-2010 school year began on September 1, 2009. Beverly Franklin and Terry Loveday were laid off teachers awaiting recall. Franklin was laid off effective June 12, 2009. A substitute teacher taught her business management and marketing/school store classes from September 1, 2009 until September 24, 2009, when she was recalled. Loveday, who was laid off on June 19, 2007, contacted Respondent in the fall of 2009 after being told by an acquaintance that a substitute teacher began teaching his physical education classes in September 2009. Respondent notified Loveday in December 2009 that he would be recalled to teach physical education effective January 4, 2010.

Charging Party argues that, since Franklin and Loveday had recall rights, they should have been recalled at the time Respondent decided to offer classes which they were certified and qualified to teach. For Franklin, this would have been the first day of the 2009-2010 school year. For Loveday, it would have been the end of September 2009, when physical education classes resumed. Charging Party asserts that Respondent ignored the layoff and recall language in the contract when it temporarily assigned substitute teachers to teach Franklin's and Loveday's classes. Respondent counters that it did not fail to recall either Franklin or Loveday to a "vacancy," as defined in Article 8 of the contract, which defines vacancy as "the resulting full school or remainder of school year (of a semester or more) bargaining unit opening that exists after all consideration of teacher requested change of assignments, and reassignments have been completed."

According to Respondent, Article 8 means that a position is not vacant until it is open for an entire school year or a period of a full semester or more. It argues that neither Franklin's nor Loveday's classes were "vacant" prior to their recall and, therefore, it did not violate the collective bargaining agreement by temporarily assigning substitutes to teach their classes. Respondent asserts that there is a bona fide dispute over the interpretation of what constitutes a "vacancy" for purposes of recall.

Discussion and Conclusions of Law:

Charging Party claims the ALJ erred in finding that Respondent did not repudiate the contract and did not fail to bargain in good faith. Although we have the authority to interpret contracts to determine whether an unfair labor practice has been committed, we will not exercise jurisdiction over every contract dispute. An alleged breach of contract is not an unfair labor practice unless repudiation of the contract is found. Repudiation occurs where a party's actions

amount to a rewriting of the contract or show complete disregard for the contract as written. *City of Pontiac*, 26 MPER 30 (2012); *Gibraltar Sch Dist*, 16 MPER 36 (2003).

The Commission finds repudiation when: 1) a contract breach is substantial; 2) the breach has a significant impact on the bargaining unit; and 3) there is no bona fide dispute over interpretation of the contract. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894; *Gibraltar Sch Dist*, 16 MPER 36. We do not find repudiation if the breach is insubstantial or isolated. *Wayne Co Cmty College*, 16 MPER 33 (2003). Moreover, we have repeatedly held that there is no breach of the duty to bargain when the parties have a good faith dispute over contract interpretation, and we refuse to exercise jurisdiction over such a dispute where the contract provides a mandatory binding procedure for dispute resolution. *City of Royal Oak*, 23 MPER 107 (2010); *Wayne Cty*, 19 MPER 61 (2006).

Here, the ALJ correctly concluded that Charging Party did not allege facts which demonstrate that the dispute arose from anything other than a difference in contract interpretation. She was, thus, correct in finding that the parties had a bona fide dispute over the interpretation of Article 8 and, because the contract provides for a grievance procedure culminating in binding arbitration, Charging Party should have utilized the grievance procedure. We agree with the ALJ that an unfair labor practice proceeding is not the appropriate forum for the resolution of routine contract disputes.

The ALJ was also correct that, even if the failure to timely recall Franklin and Loveday was a breach of the contract, the breach was isolated and did not significantly impact the bargaining unit. Charging Party did not produce evidence that any other teachers were denied timely recall, nor was there evidence that Respondent refused to recognize its contractual duty to recall laid off teachers. In addition, in order to prove repudiation, the actions of the employer must significantly impact the entire collective bargaining unit. *Wayne Cty Comm Coll*, 16 MPER 33 (2003). In *Wayne Cty Comm Coll*, the Commission noted that the conduct in question affected only one employee and was an isolated incident that failed to "significantly impact the collective bargaining unit as a whole."

Charging Party also claims that the ALJ erred in concluding that Franklin and Loveday were not entitled to back pay from the first day of the 2009-2010 school year until the day they returned to work. It argues that the failure to award back pay demonstrates a significant impact on the bargaining unit. However, the ALJ's finding that the alleged breach of contract did not significantly impact the bargaining unit is irrelevant to the issue of whether Franklin and Loveday should receive lost wages. Back pay is a remedy that is only ordered once an unfair labor practice has been established. Because the ALJ determined that Respondent did not commit an unfair labor practice, Franklin and Lovejoy were not entitled to back pay. *Technical, Professional & Officeworkers Assn of Michigan*, 23 MPER 92 (2010).

We have carefully examined all other issues raised by Charging Party in its exceptions and find they would not change the result. We, therefore, affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge and issue the following Order:

ORDER

The unfair labor practice charge is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: March 26, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

RIVER ROUGE SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C09 J-202
Docket No. 09-000021-MERC

-and-

RIVER ROUGE EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Lusk & Albertson, by Robert T. Schindler, for Respondent

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

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

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 case was heard in Detroit, Michigan on March 7, 2014, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before April 28, 2014, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Procedural History:

The River Rouge Education Association filed this charge on October 20, 2009 against the River Rouge School District alleging that it violated its duty to bargain in good faith under §10(1)(e) of PERA. Charging Party represents a bargaining unit that includes Respondent's teachers. The charge alleged that Respondent repudiated provisions of the parties' collective bargaining agreement dealing with recalls from layoff and the filling of vacancies by filling teaching assignments with nonunit substitute teachers at the beginning of the 2009-2010 school year instead of recalling bargaining unit members to fill these vacancies or offering these assignments to other members of the unit.

The charge was originally assigned to MAHS Administrative Law Judge Doyle O'Connor. ALJ O'Connor conducted a pre-hearing conference on February 10, 2010. On February 19, 2010, the charge was amended to allege that one teacher, Lisa LaForest, should have been recalled at the beginning of the school year, but instead was offered only a substitute teacher position. ALJ O'Connor conducted a second settlement conference on May 20, 2010, at which the parties apparently reached a settlement of the underlying claim. No evidence was introduced into the record regarding the terms of the settlement.

After the May 20, 2010 settlement conference, the charge was placed in inactive status awaiting withdrawal. On April 11, 2011, Charging Party asked that the hearing be rescheduled because the parties could not agree as to whether three teachers who were not recalled at the beginning of the 2009-2010 school year, Beverly Franklin, Terry Loveday, and Lisa LaForest, were entitled to back pay from the start of the school year to the date of their recall later that school year. No hearing was held as the parties continued to discuss the issue of back pay for these three teachers. In September 2013, the case was reassigned to me after ALJ O'Connor left State service. On January 24, 2014, I conducted a third prehearing conference. At this conference, the parties settled the portion of the charge relating to LaForest.

As set forth below, Respondent's 2009-2010 school year began for teachers on September 1, 2009. Franklin was recalled on September 24, 2009 and Loveday returned to work on January 4, 2010. The evidence presented at the hearing related to the issue of whether Respondent violated its contractual obligations by not recalling Franklin and Loveday earlier in the school year. No evidence was presented regarding Respondent's failure or refusal to recall any other employee.

Findings of Fact:

The Collective Bargaining Agreement

The parties' 2007-2011 collective bargaining agreement included the following provisions.

Article (1)(b) and (c) stated that, except as modified by the specific terms of the agreement, Respondent retained all rights and power to manage the school district, including the right to "establish levels and courses of instruction, including special programs."

Article 7, entitled "Reduction in Staff" contained these subsections:

> 7(1)(c). In recalling teachers whose services have been terminated because of a necessary reduction in staff, the basis for recall shall be seniority within the school system, certification, and qualifications for the available positions.
>
> 7(7). In recalling tenure teachers whose services have been terminated because of a necessary reduction in staff, the basis for recall shall be seniority within the school system in a position for which the teacher is certified and qualified.

7(8)(b). Teachers on layoff will have recall rights for up to six (6) years commencing with the 2002-2003 school year.

Article 8, entitled "Vacancies," included the following:

A vacancy shall be defined as the resulting full school or remainder of school year (of a semester or more) bargaining unit opening that exists after all consideration of teacher requested change of assignments and reassignments have been completed. [Emphasis added.]

8(1)(a). In filling posted vacancies and new positions, the Board shall continue to seek out the best qualified candidates available. All qualified teachers will be given an opportunity to apply for such positions. If, in the determination of the Board or its designee, the qualifications of the candidates are equal, preferences will be given to candidates from within the school system

8(1)(b). *When there are laid-off teachers, vacancies will be filled by the most senior laid-off teacher who is certified and qualified or who had previously held the specific assignment, e.g. counseling art, music, etc.* Vacancies that cannot be filled by laid-off teachers shall be posted in the normal manner. Teachers who have been involuntarily assigned/reassigned and who wish to be assigned to another building, grade, and/or subject may make a written request for such assignment to the Superintendent. Such request shall be honored to the extent possible. [Emphasis added.]

8(1)(c). New positions which were previously not in existence in the school district shall be posted in all instances.

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8(1)(e). When in the event that the Board of Education is unable to fill a posted vacancy through the channels outlined previously in this section, then the Board shall be permitted to seek out and contract with outside agencies to perform the duties of such posted positions. The Board shall notify the Association prior to seeking contracting with outside agencies. Such vacancies shall be contracted on a semester basis and the position shall remain posted.

The collective bargaining agreement also contained a grievance procedure culminating in binding arbitration. The agreement had no provision explicitly dealing with the assignment of work to nonunit substitutes.

Respondent's Financial Problems and the Layoff of Unit Members

Between the start of the 2006-2007 school year and the end of the 2008-2009 school year, Respondent's student population fell by over twenty-five percent, with a higher percentage in the middle and elementary schools. By 2009, in large part because of this enrollment drop, Respondent was a so-called "deficit district," a school district for which annual expenditures exceeded revenues and which had no fund balance.

In response to its falling enrollment, Respondent eliminated positions and laid off teachers at the ends of several successive school years before the 2009-2010 school year. One of the teachers who was laid off was Terry Loveday. Loveday was certified in physical education and secondary psychology. He was laid off at the end of the 2006-2007 school year. Beverly Franklin was laid off in June 2009 at the end of the 2008-2009 school year. Franklin, who was certified and highly qualified in business education, had taught business education classes at the high school.

In the spring of 2009, Respondent and Charging Party were parties to a collective bargaining agreement with an expiration date of August 31, 2011. According to Charging Party, in May 2009 Respondent asked Charging Party to reopen the contract and agree to substantial economic concessions because of Respondent's financial situation. Charging Party refused. On July 22, 2009, Respondent issued layoff notices to twenty-four teachers in addition to those laid off in June.

Respondent's teachers returned to work for the 2009-2010 school year on September 1, 2009. On September 16, 2009, Respondent's Board of Education voted to recall sixteen teachers. Two other teachers were recalled on September 21, 2009. At a Board meeting on September 23, 2009, the Board approved the recall of five more teachers, including Franklin. However, according to Charging Party, after these recalls at least thirteen positions continued to be filled by substitutes outside the bargaining unit.

Franklin

Franklin began working for Respondent as a teacher in 1986. As noted above, Franklin was laid off from her position as a business education teacher at the high school at the end of the 2008-2009 school year. After the Board meeting on September 23, 2009, Franklin was called and told to report to work the following day. Respondent gave Franklin an "adjusted contract" from which $7,014.71, an amount equivalent to her wages for seventeen days, was subtracted from her salary. After her recall, Franklin was assigned four sections of a class entitled business management and two sections of a marketing/school store class.

Franklin testified that Blaine Denning, a nonunit substitute teacher, taught both her business management and marketing/school store classes in 2009-2010 before she returned to work on September 24. Respondent presented no witnesses to contradict Franklin's testimony. Instead, it offered a document entitled "Master Schedule by Teacher" for Respondent's high school for the 2009-2010 school year as proof that the classes Franklin taught after her recall were not taught by a substitute between the beginning of the school year and her recall. To attest

to the authenticity of the document and explain it, Respondent called its current superintendent, who was not employed by Respondent until 2012. The master schedule lists the classes assigned to each high school teacher for that school year. Some teachers are listed by name, while others are designated as "staff." That is, the schedule includes lists of classes allegedly taught by "Staff A," "Staff E," and so on. The superintendent testified that "staff" means nonunit substitutes, and that classes listed as being taught by "staff" were assigned to substitutes for some period during the school year. However, he could not say for what periods the substitutes designated as "staff" taught the listed classes, or whether substitutes taught classes other than those listed as assigned to "staff" at any period during that school year. On the master schedule, Franklin is listed as assigned to sections 1 and 2 of a full-year class entitled marketing/school store. According to the schedule, "Staff A" was assigned to sections four and five of marketing/school store, and "Staff E" was assigned to section 3 of marketing/ school store. Franklin is also listed as assigned to sections 2, 3, 4 and 5 of a full-year class entitled business management. No other teacher is listed as teaching business management, although "Staff K" was assigned to another business education class, business communications, and "Staff" E," was assigned to two sections of a class entitled "Success 101."

I find Franklin to be a credible witness. I also find it likely that Franklin would have remembered had her business management and marketing/school store students *not* been assigned another teacher before Franklin returned to work three weeks into the school year. I conclude that Respondent's evidence does not provide a basis for discrediting Franklin's testimony that the classes to which she was assigned in 2009-2010 were taught by a substitute before her recall on September 24.

Loveday

Loveday was hired by Respondent in 1995. As noted above, Loveday was laid off at the end of the 2006-2007 school year. Effective January 4, 2010, he was recalled to an elementary school physical education position at Respondent's one elementary school, Ann Visger Elementary.

At Ann Visger, physical education and foreign languages are considered "specials" classes. Students attend specials classes during their classroom teachers' assigned preparation periods. The specials classes, therefore, serve two objectives; they enrich the students' educational experiences and keep the students occupied during their regular teachers' preparation periods. For some years prior to the 2009-2010 school year, physical education classes at Ann Visger were taught by a Mrs. Harvey. Mrs. Harvey retired at the end of 2008-2009 school year.

Tammy Hubbard, the principal of Ann Visger, testified that because of Respondent's grim financial situation in 2009, Ann Visger began the 2009-2010 school year without any specials classes. According to Hubbard, Respondent needed to know the enrollment numbers at Ann Visger, figure out how many teachers in total the school was going to have, and get those teachers in place before determining how many specials classes it needed to have to cover the teachers' preparation periods. At the beginning of the 2009-2010 school year, two daily building substitutes, including Charles Jordan, were assigned to Ann Visger on a regular basis. The two building substitutes taught teachers' classes during their preparation periods in addition to filling

in for teachers who called in sick. If the school needed more than two substitutes for these purposes on a given day, it used Respondent's "call-off" system to obtain daily substitutes.

Hubbard testified that sometime after the beginning of 2009-2010 school year, a world language specials class was begun at Ann Visger. Shortly thereafter, but before the end of September 2009, Respondent decided that Ann Visger needed a second specials class. According to Hubbard, she was informed by Pat DelaTorre, from Respondent's human resources department, that there was going to be a physical education specials class and that Jordan would be teaching it as a substitute. Jordan began teaching the physical education classes at Ann Visger around the end of September 2009 and continued to do so until Loveday replaced him in January 2010.

Sometime during the fall of 2009, Loveday contacted Charging Party after he was told by an acquaintance that a substitute teacher was teaching physical education at Ann Visger. Sometime in December 2009, Respondent notified Loveday that he would be recalled to teach physical education at the elementary school effective January 4, 2010, the first day of school after the Christmas break.

Discussion and Conclusions of Law:

As the Supreme Court held in *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309 (1996), and recently reaffirmed in *Macomb Co v AFSCME Council 25*, 494 Mich 65, 79-82 (2013), it is not the Commission's role to involve itself in interpreting the parties' collective bargaining agreement when the agreement provides a grievance process that ends in binding arbitration and the agreement "covers" the dispute. When the parties have agreed to a separate grievance or arbitration agreement, the Commission's role in the context of a refusal-to-bargain claim is ordinarily limited to determining whether the agreement covers the subject of the claim. *Port Huron,* at 321; *Macomb Co,* at 80.

The Commission has held, however, that a party's repudiation of the terms or a significant term of its collective bargaining agreement constitutes a violation of its duty to bargain in good faith. Repudiation occurs where a party's actions amount to a rewriting of the contract or show complete disregard for the contract as written. *City of Pontiac,* 26 MPER 30 (2012); *Gibraltar Sch Dist,* 16 MPER 36 (2003); *Central Michigan Univ,* 1997 MERC Lab Op 501, 507. A mid-term modification of a collective bargaining agreement by either party without negotiation and agreement by the other party constitutes a violation of the duty to bargain in good faith and an unfair labor practice. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n,* 458 Mich 540, 563-568 (1998).

The Commission finds repudiation only when: (1) the contract breach is substantial, and has a significant impact on the bargaining unit, and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Community Sch*, 1984 MERC Lab Op 894, 897; *Gibraltar Sch Dist,* supra. The Commission will not find an unfair labor practice based on an insubstantial or isolated breach of contract. *Crawford Co Bd of Comm'rs,* 1998 MERC Lab Op 17, 21; *Wayne Co Cmty College,* 16 MPER 33 (2003); *Michigan State Univ,* 1997 MERC Lab Op 615.

According to Charging Party, since Franklin and Loveday had recall rights, under Article 8(1)(b) of the contract they should have been recalled at or before the time Respondent decided to offer classes which they were certified and qualified to teach. For Franklin, this was the first day of the 2009-2010 school year. For Loveday, it was around the end of September 2009, when physical education classes resumed at Ann Visger. Charging Party asserts that Respondent refused to follow the layoff and recall language in the contract by assigning substitute teachers to classes that could have been staffed by Franklin and Loveday. Respondent argues, however, that it did not fail to recall either Franklin or Loveday to a "vacancy," within the meaning of Article 8. According to Respondent, under that Article a position does not become vacant until it is open for a full semester or more. It argues that neither the high school business education position to which Franklin was recalled nor the physical education position to which Loveday was recalled were vacant, for purposes of Article 8, prior to their recall. Therefore, according to Respondent, it did not violate the collective bargaining agreement by temporarily assigning substitutes to teach the classes to which Franklin and Loveday were later recalled.

Charging Party presented no evidence that Respondent failed to recall any teacher other than Franklin and Loveday in a timely manner. Nor was there any evidence that Respondent refused to recognize that it had a contractual obligation to recall laid off teachers to vacancies which they were qualified and eligible to fill. I find no basis in this record to find Respondent guilty of repudiating the provisions in its contract dealing with recall and the filling of vacancies. Even if Charging Party's interpretation of Article 8 is correct and Respondent breached the contract by its delay in recalling Franklin and Loveday, these were isolated instances of contract breach that did not significantly impact the bargaining unit. As the Commission and Courts have repeatedly emphasized, an unfair labor practice proceeding is not the appropriate forum for the resolution of routine contract disputes. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 3, 2014