STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C15 C-045
-and- Docket No. 15-021421-MERC

DETROIT FEDERATION OF TEACHERS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Joline R. Davis, Assistant Director of Office of Labor Relations, for Respondent

Scheff, Washington and Driver, by Shanta Driver, for Charging Party

DECISION AND ORDER

On August 19, 2015, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by either of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: October 29, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT PUBLIC SCHOOLS, Case No. C15 C-045
Respondent-Public Employer, Docket No. 15-021421-MERC

-and-

DETROIT FEDERATION OF TEACHERS,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Joline R. Davis, Assistant Director of Office of Labor Relations, for the Respondent-Public Employer

Scheff, Washington and Driver, by Shanta Driver, for the Charging Party-Labor Organization

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

On March 25, 2015, the Detroit Federation of Teachers (Charging Party or Union) filed the present unfair labor practice charge against the Detroit Public Schools (Respondent or Employer). 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 assigned to Travis Calderwood, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System (MAHS), on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

The Charging Party alleges in its above captioned charge the following:

> The Detroit Federation of Teachers was informed by the employer today, March 3, 2015, that the employer would no longer hear grievances concerning discharge or discipline.

Also on March 25, 2015, Charging Party filed a separate unfair labor practice charge, Case No. C15 C-044, Docket No. 15-021420-MERC, against Respondent in which it alleged that a Union member had been retaliated against in violation of PERA for exercising rights provided to her under the Act.

On March 31, 2015, a third unfair labor practice charge, Case No. C15 C-046, 15-021422-MERC, was filed against Respondent by Charging Party in which the Union alleged various violations of PERA, including retaliation, intimidation and coercion.

On April 15, 2015, the parties were provided notice that the three matters, Case Nos. C15 C-044, C15 C-045 and C15 C-046, would be consolidated for purposes of holding a pre-hearing conference on April 28, 2015. That pre-hearing conference was adjourned to May 5, 2015. During the May 5, 2015, conference call, Respondent's counsel indicated that she planned to file separate motions seeking dismissal of the three charges by May 15, 2015. Charging Party agreed to file written responses to any motion filed along with any request for oral argument, if desired, by June 5, 2015. The proceedings were scheduled to be heard on July 8, 2015, either as oral argument or as an evidentiary hearing depending on the arguments of the parties.

Both Respondent and Charging Party requested and were granted extensions in which to file the pleadings, respectively. On May 22, 2015, Respondent filed motions seeking dismissal of each of the three consolidated cases. On June 12, 2015, Charging Party filed responses in Case Nos. C15 C-045 and C15 C-046, Docket Nos. 15-021421-MERC and 15-021422-MERC, along with a response and cross-motion for summary judgement in Case No. C15 C-044, Docket No. 15-021420-MERC.

The parties appeared before the undersigned for oral argument on July 8, 2015. Following oral argument, I determined on the record that the three cases should not be consolidated but rather should be dealt with individually. Accordingly, I informed the parties on the record that the three consolidated cases would be bifurcated. I then, on the record, denied Respondent's motions in Case Nos. C15 C-044 and C15 C-046, Docket Nos. 15-021420-MERC and 15-021422-MERC, and denied Charging Party's cross-motion seeking summary judgement in Case No. C15 C-044.[1]

With respect to Case No. C15 C-045, Docket No. 15-021422-MERC, Respondent seeks dismissal of the charge pursuant to Commission Rule 165, R 423.165(2)(d). Respondent claims Charging Party failed to allege that the Respondent interfered with, restrained, or coerced public employees in the exercise of their Section 9 rights. Furthermore, Respondent asserts that Charging Party's allegation encompasses a prohibited subject of bargaining such that it cannot be grieved and therefore cannot serve as a cause of action as an unfair labor practice charge under PERA. After considering the extensive arguments made by counsel for both parties on the record and in their filings, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party failed to state a claim under PERA for which relief could be granted. I informed the parties that following the receipt of the transcript, I would issue a written decision and recommended order in Case No. C15 C-045, Docket No. 15-021421-MERC. That decision and recommended order is as follows:

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1 My rationale and decision denying said motions will be addressed at such time that a Decision and Recommended Order is issued in those respective cases.

Background and Findings of Fact:

The relevant facts for purposes of deciding Respondent's motion are not in dispute.

On July 19, 2011, the state Legislature gave immediate effect to Public Act 103 of 2011 (PA 103), thereby amending Section 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.

The Charging Party and Respondent are parties to a collective bargaining agreement, effective July 1, 2012, through June 30, 2016.

Charging Party filed four grievances regarding the discipline and/or discharge of four members of the Union; three tenured teachers, Marta Lazar, Elizabeth Wathen, and Evelyn Lossia, and one probationary teacher, Jones Onwenu. On March 3, 2015, the parties met concerning one of the grievances. That same day, a representative for Respondent provided Charging Party a letter indicating that the four grievances were "rejected and not enforceable through the grievance and arbitration procedure of the parties' collective bargaining agreement."

Discussion and Conclusions of Law:

At the onset it is important to note that although Charging Party alleges that the letter provided to it on March 3, 2015, indicated that Respondent "would no longer hear grievances concerning discharge or discipline," it was established on the record at oral argument that the conduct complained of was limited to the school district's refusal to hear the grievances involving the four individuals identified above. As such, the limited issue before the undersigned is whether Respondent has violated PERA in its decision to reject the aforementioned grievances.

As stated above, PA 103 amended Section 15 of PERA to add several additional prohibited subjects of bargaining that a public school employer and a bargaining representative are precluded from bargaining over. In *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff' d 453 Mich 362 (1996), the Court of Appeals, when discussing the amendments to PERA made by Public Act 112 of 1994 (the precursor to PA 103), the Court of Appeals concluded that what the Legislature

"intended was to foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them or that they could ever become part of a collective bargaining agreement." According to the Court, Sections 15(3) and (4) of PERA, "evince a legislative intent to make public school employers solely responsible for these subjects by prohibiting them from being the subjects of enforceable contract provisions. Accordingly, for purposes of the instant action, Section 15(3)(m) of PERA precludes the parties from bargaining over discipline and discharge of those individuals whose employment is regulated by the Teachers Tenure Act (TTA).

Since its enactment, PA 103 has been addressed in several decisions by the Commission, several of which are identified below. In *Pontiac Sch Dist*, 27 MPER 52 (2014), the Commission considered: (1) whether a public school employer had a duty to bargain over the contents of a student questionnaire which sought opinions about teacher performance and which ultimately was used in the evaluation of the teachers; and (2) whether the district could involuntarily transfer a teacher who was accused of inappropriate conduct at a middle school without first bargaining with the union. The Commission in affirming the ALJ's recommended order for dismissal stated:

> [W]e agree that pursuant to § 15(3)(l) of PERA, the Employer has no duty to bargain over the use of questionnaires to obtain student opinions about teacher performance. We also agree with the ALJ that the involuntary transfer of the teacher was a decision made by the Employer about teacher placement and is a prohibited subject of bargaining under § 15(3)(j) of PERA.

In *Ionia Pub Sch*, 27 MPER 55 (2014), aff'd *Ionia Public Schools v Ionia Education Association*, __ Mich App __, 2015 WL 4545946 (July 38, 2015)2, the Commission addressed whether the public school employer violated Sections 10(1)(a) or (e) PERA when it refused to hold "bid-bump" meetings with the district's teachers and by refusing to post vacant teaching positions, both of which the district had done prior to the enactment of PA 103. The Commission found that the public school employer "has no duty to bargain over decisions about teacher placement, as such decisions are prohibited subjects of bargaining under § 15(3)(j) of PERA." *Id.* The Commission stated that "[t]his includes decisions on holding a teacher assignment or bid-bump meeting and posting vacant teaching positions." *Id*. The Commission went on to emphasize that not only was there no duty to bargain over that issue, but also that "the parties are prohibited from doing so." *Id.*

In *Pontiac Sch Dist*, 28 MPER 1 (2014), the Commission was presented with the question whether PA 103 forgave the public school employer from a duty to adhere to past practices permitting teachers to meet with administrators before their positions were abolished and giving displaced teachers an opportunity to choose their new assignments from available vacancies following the expiration of the parties' collective bargaining agreement. The Commission stated:

> After 2011 PA 103 was enacted, provisions of the parties' expired collective bargaining agreement that applied to decisions regarding layoff and recall or teacher placement that once were mandatory subjects of bargaining became prohibited

2 The Court of Appeals decision in *Ionia Public Schools v Ionia Education Association,* was issued after the July 8, 2015, oral argument and my issuance of the decision on the record dismissing the present charge, but prior to the issuance of this written decision and recommended order.

> subjects of bargaining pursuant to § 15(3)(j) and (k). Therefore, the Employer is no longer required to comply with those provisions of the expired contract. The same is true of past practices that may have modified the parties' collective bargaining agreement, if those past practices applied to decisions regarding layoff and recall or teacher placement.

In *Ann Arbor Pub Sch*, 28 MPER 32 (2014), the Commission adopted the ALJ's Recommended Decision and Order, in which he dismissed an unfair labor practice charge brought by a teacher against both her public school employer and her union. There, the teacher alleged that the public school employer violated PERA by transferring her and discriminating against her, and that the union improperly failed to challenge the employer's actions because it did not file a grievance over the transfer. With respect to the charge against the public school employer, the ALJ initially found that the charge was untimely filed as the conduct complained of had occurred more than six months prior to the filing of the charge.3 With respect to the charge against the union, the ALJ concluded that the charge failed to state a claim under PERA because PA 103 precluded the Association from filing a grievance over the transfer because said conduct was a prohibited subject of bargaining under Section 15(3) of the Act.

In *Pontiac Sch Dist*, 28 MPER 34 (2014), the Commission once again held that a public school employer, by nature of PA 103, lacked any duty to bargain over the transfer of a teacher, in this case a speech pathologist.4 The Commission went further and concluded that the union committed an unfair labor practice in that it violated its duty to bargain under PERA by attempting to advance a grievance over the transfer to arbitration. The Commission was careful however to restate that "the parties may discuss a prohibited subject of bargaining, [however] neither party may insist on carrying that discussion beyond the limits set by the other party." *Id.*

In the instant case, Charging Party claims that Respondent has a duty under PERA to process grievances over discipline and/or discharge of four teachers. I disagree. Any duty to do so may only arise because the parties bargained such duty and PA 103 precludes just such an agreement with respect to teachers whose employment is regulated by the TTA.5 MCL 423.215(3)(m); See *Iona Pub Sch.* Furthermore, any past practice of processing such grievances for those employees does not create a duty that extends past the enactment of PA 103. See *Pontiac Sch Dist*, 28 MPER 1 (2014).

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3 The ALJ also concluded, regardless of the timeliness failure, that charging party had failed to articulate a charge against the district that could "provide a factual basis which would support a finding that [charging party] engaged in union activities for which she was subjected to discrimination or retaliation in violation of the Act."

4 On exceptions, the union challenged whether a speech pathologist is considered a "teacher" and therefore not subject to the Section 15(3)(j) of PERA. The Commission declined to entertain the argument since the union had not argued that previously before the ALJ.

5 Charging Party argued that with respect to the probationary teacher grievance, PA 103 does not apply because a probationary teacher's employment is not regulated the TTA. I find such an argument without merit. As set forth above, Section 15(3)(m), states that a public school employer and a union are prohibited from bargaining over the discharge and discipline of "public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191." The entirety of Article II of the TTA, MCL 38.81 to 38.84, entitled "Probationary Period," is devoted to probationary teachers and includes provisions regarding the probationary period, effectiveness ratings, individualized development plans, and the successful completion of the probationary period, among other issues unique to probationary teachers. As such, any argument that probationary teachers are not included in the group identified in Section 15(3)(m) of PERA must fail.

Charging Party puts forth several other arguments as to why the District "should" still be required to process grievances over teacher discipline and discharge; however, none of these arguments put forth establish that a duty exists under PERA or that the parties could be bound by any decision or agreement to do so.

In its written response to Respondent's motion, Charging Party first argues that by not processing the grievances of teachers challenging discipline and/or discharge, a definitive date for purposes of appealing employment decisions to the Teacher Tenure Commission (TTC), the body charged with enforcing the TTA, becomes difficult to establish, and that by not allowing the discipline to proceed through the grievance process, the teacher is denied certain safeguards under the TTA. It is not necessary for the undersigned to consider such an argument since it in no way implicates the rights of public employees under PERA.

At oral argument, Charging Party argued that the discipline and/or discharge that it sought to challenge by way of the grievances had been predicated on unlawful discrimination; in one case, the discipline had been allegedly imposed in violation of the Americans with Disabilities Act and another had been allegedly imposed in violation of the teacher's civil rights. With respect to public employers, PERA does not prohibit all types of discrimination or unfair treatment. PERA does not provide a remedy for an employer's violation of another state or federal statute. Section 15(3)(m) does not preclude Charging Party from challenging decisions made by a public school employer as being contrary to state or federal law. Charging Party is free to pursue potential violations of state and federal law in the appropriate forum.6

Having considered all other arguments of the parties and concluding they do not warrant any change in the result, it is the opinion of the undersigned that Charging Party has failed to state a claim upon which relief can be granted under PERA. As such and in accord with the conclusions of law set forth herein, I recommend that the Commission grant Respondent's motion for summary disposition and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 19, 2015

6 Along with this argument, Charging Party also asserts that processing grievances would allow the Respondent to correct possible violations of state and federal law prior to being forced to defend its actions in state or federal court. While I agree with Charging Party's logic and position in this regard, the fact remains that Section 15(3)(m) of PERA precludes the finding of such a duty with respect to teachers.