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Council News

Michigan Council of School Attorneys

President's Letter

Katherine W. Broaddus, Thrun Law Firm

I assumed the role of Council of School Attorneys President last year with great excitement for what the future of school law holds. In the last 10 years, school law has changed in many respects. It is wonderful to lead an organization that continues to serve both school attorneys and administrators by monitoring current legal issues and presenting those issues at legal conferences and in this newsletter. I am particularly proud of the Council's continued focus of pairing with other organizations such as the Michigan Association of School Administrators and Michigan School Business Officials to reach more attorneys and administrators affected by legal issues and recent changes in the law. I hope that this collaboration continues long past my tenure.

Since 2011, those of us who practice in labor and employment have watched with great interest how the various administrative agencies and courts continue to address and interpret amendments made to the Teachers' Tenure Act, Public Employment Relations Act and Revised School Code. I had the pleasure of co-presenting at the Michigan Association of School Boards/MCSA Fall Conference in Grand Rapids in 2014 with Kevin Harty. We gave a tenure update for the audience made up of mostly school administrators and board members. It is truly an interesting time to practice in this field and evaluate issues from all angles. Four years later, it is remarkable to see how the 2011 amendments are impacting school districts throughout the state.

I have also had the opportunity to speak with new attorneys, current law students and future law students to champion the benefits of working in a diverse area like school law. Through my role as President, I became acquainted with Professor Kristi Bowman at Michigan State University College of Law who is collaborating with other attorneys and interested parties to create a competition for law school students to encourage more students to look at school law as a potential career option. This field contains so many knowledgeable and experienced attorneys who are eager to share their "war stories" and expertise.

I cannot overstate the benefits that I have received through my involvement with the Council of School Attorneys. I believe that the Council benefits all school attorneys no matter where you are in your career and I encourage other attorneys to become involved in the organization. I hope the Council continues to grow and expand by working collaboratively with other organizations and recognizing continuing opportunities for growth.

Layoff, Recall and Tenure After the Baumgartner Decision

Robert Schindler, Lusk & Albertson, PLC

The Michigan Court of Appeals recently issued its decision in *Baumgartner v Perry Public Schools,* COA Case No. 314158 (2015). *Baumgartner*, of course, was a consolidated appeal of three cases arising out of the State Tenure Commission all focused on whether the STC had jurisdiction to hear cases related to layoff and recall. The court held that the STC does not have jurisdiction to hear such claims, even where the teacher is claiming that the layoff or recall was made in bad faith or as a subterfuge to avoid the protections of the Teachers Tenure Act, MCL 38.71 et seq.

The issues in *Baumgartner* arose from the passage of Public Acts 100, 101, 102 and 103 of 2011. Those acts significantly altered the TTA. Two of the major relevant changes were that the 2011 Acts removed MCL 38.105, which granted teachers a three-year right of recall after a necessary reduction in personnel, and also amended the definition of "demote" in MCL 38.74 to make clear that a necessary reduction of personnel is not included. In addition to amending the TTA, the 2011 Acts amended the Revised School Code by adding Section 1248, which described the basic framework of how personnel decisions (including layoff and recall) should be made. The 2011 Acts then further made those personnel decisions prohibited subjects of bargaining under the Public Employment Relations Act, MCL 423.215. Section 1248 also created a limited remedy for teachers that believed the act to be violated and filed a claim in a "court of competent jurisdiction."

In each of the cases later consolidated by the court, the STC held it still had jurisdiction to hear claims that the decision to layoff or not recall a teacher was made in bad faith or as a subterfuge to avoid the protections of the TTA. The STC held this was based on a teacher's right to continuous employment—a right granted by MCL 38.91, which was not amended by the 2011 Acts. In a strongly worded decision, however, the Court of Appeals not only reversed the STC, but chided it for attempting to hold onto jurisdiction for such cases. In essence, the *Baumgartner* court stated that the Legislature clearly intended a sea change in Michigan school law—including removing any right associated with layoff and recall from the TTA—but the STC was doing all it could to hold onto the past and not enforce the change the Legislature was making. As a result, the *Baumgartner* court made clear that the STC has no jurisdiction to hear layoff or recall cases. Rather, such cases should be pursued in Michigan courts under Section 1248 of the Revised School Code.

Thus, the issue now becomes what current effect the *Baumgartner* decision has for Michigan schools and school lawyers. The first consideration is the impact of the decision on STC jurisprudence. The cases consolidated in *Baumgartner* had all been decided by the STC nearly two years prior to the issuing of the decision of the Court of Appeals. In those two years, a number of cases were decided by the STC that reinforced and built upon the layoff and recall doctrine set out in the *Baumgartner* cases. The court's decision effectively reverses all of those decisions and requires the STC to refuse to take any layoff and recall cases filed in the future.

The *Baumgartner* decision also makes clear that, moving forward, all claims related to the layoff or recall of a teacher should be filed in court pursuant to Section 1248 of the Revised School Code, MCL 380.1248, or other applicable law (*i.e.,* discrimination law, breach of contract, etc.). This results in several potential hurdles for Michigan school districts. The first is what exactly are the elements and issues to be set out in a case under Section 1248? That is unclear at this point. Because the STC had been holding onto jurisdiction of layoff and recall, relatively few cases have been litigated under Section 1248. As a result, only one 1248 case—*Garden City Education Association v Garden City School District,* 975 F Supp 2d 780 (ED Mich, 2013)—has been published. *Garden City,* unfortunately, does not give significant guidance as to the substance of a 1248 suit. Instead, that decision focuses on the necessity for damages (*i.e.,* that a teacher must still be laid off) as an essential element to bring such a suit. It also gives some analysis on the interaction of 1248 with tenure rights and due process—though, in doing so, the *Garden City* Court relied, in part, on the fact that a right existed to seek an appeal under the STC's decisions in *Baumgartner* and its progeny.

That having been said, we are sure to get some clarity over the next several years as new parties will have an automatic right to appeal to the Court of Appeals from these decisions—a right that parties did not possess coming from the STC where an application for leave to appeal had to be filed to the Court of Appeals. Thus, the substance of these cases will now have to be decided by the courts. This

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leaves some current uncertainty for Michigan school districts that will now have to wait as these cases are filed and make their way up to the appellate courts before we can have hard guidance as to the substance of a 1248 suit. One of the benefits of an administrative hearing is the faster timeline and limited discovery process.

As a result, another potential hardship for school districts arising out of the *Baumgartner* decision is the financial burden associated with a 1248 suit. A lawsuit, as opposed to an administrative hearing, is far more time consuming and expensive. Thus, while school districts will now have the right and ability to have surety in an appeal, it will be more costly to get there. This, of course, cuts both ways as the cost is greater on unions as well. This cost differential will likely have the effect of limiting the number of cases that will be filed by teachers or their unions.

Next, the question arises as to what this decision means to the tenure rights of teachers, especially those who face a layoff. That is still left to be determined by the STC and the courts, but a few aspects seem clear. First, a tenured teacher still possesses the right to continuous employment under MCL 38.91. This means that they cannot be discharged without the protections and procedures of the TTA. These protections and procedures—including the right to a hearing—do not exist where the teacher has been laid off or not recalled after a layoff. That is because a necessary reduction in personnel is outside the bounds of the protection of the TTA.

While a layoff may sever a tenured teacher's actual continuous employment, it does not sever their tenured status. Thus, if a tenured teacher is placed on layoff by a school district and later recalled, that person comes back to the school district as a tenured teacher. The TTA is clear that a teacher cannot be required to serve two probationary periods with one school district (MCL 38.82). Similarly, if that teacher goes to another school district, they are still treated as a teacher that has received tenure elsewhere and thus have a shortened probationary period (MCL 38.92). In other words, the 2011 Acts only change their rights to seek a hearing after a layoff, not the actual possession of their tenure rights.

Finally, the question arises whether any right to recall now exists for a teacher. The *Baumgartner* decision seems to make clear that no such right exists—at least not one arising from the TTA. The 2011 Acts removed the three- year right to recall formerly included in the TTA. By doing so, any automatic right to recall was also removed from the TTA—a fact that even the STC acknowledged in *Gadille v Atlanta Community Schools,* STC #12-36 (2013).

Thus, moving forward, any right to recall possessed by a teacher would be under Section 1248 of the Revised School Code or, more practically, under the policies created by school districts pursuant to that section. School districts must be cognizant of this fact because the policy that they pass will go a long way in determining whether and when laid off teachers may, or must, be recalled to employment.

Interested in Sponsoring a School Law Writing Competition?

The Michigan Council of School Attorneys is assisting with developing a school law writing competition for law students. The idea of the competition was initiated by Professor Kristi Bowman (MSU College of Law), who formed an Advisory Board that is working on the details of the contest. It will be open to all Michigan law students and is scheduled to begin later this year. The proposed first place award is a scholarship to attend a national school law conference and having the winning submission published in a Council of School Attorneys' newsletter.

The Advisory Board is currently seeking sponsorship donations from law firms and MCSA members to fund the school law conference scholarship.

If you are interested in making a donation, please contact Brad Banasik at 517.327.5929 or bbanasik@masb.org to request a sponsorship form.

Gender Identity, Civil Rights and Public Schools

Joel Gerring, Michigan Association of School Boards Assistant Legal Counsel

Matters involving the civil rights of transgender students are becoming increasingly more visible in the public eye and, as usual, guidance on the matter from most governing bodies is slow in coming. In Michigan, there are no laws that specifically address the issue of transgender individuals and discrimination, however, federal agencies are expanding the scope of current civil rights protections to include such groups. School attorneys should be aware that the Department of Education has issued "Dear Colleague" letters that touch upon the issue and make it clear that discrimination against an individual who does not conform to traditional gender identities, as well as denying a transgender student the right to participate in single-sex classes that are in-line with their declared gender identity are violations of Title IX.[1] Fourteen states and the District of Columbia have adopted laws that specifically protect transgender students from discrimination, and although neither Michigan nor the federal government is among them, this does not mean that Michigan school districts will avoid federal government scrutiny concerning such.

In the last few years, the DOE's Office of Civil Rights has begun to aggressively investigate transgender civil rights complaints nationwide regardless of any state specific laws (or lack thereof). More often than not, Voluntary Resolution Agreements between the districts and OCR are reached. These agreements, invariably, require the school district to take very detailed and specific steps to ensure Title IX compliance as it relates to transgender students. This typically entails updating handbook and policy guidelines in order to broaden the definitions of what constitutes gender-based discrimination so that it specifically includes transgender students and students who are transitioning, as well as those who simply do not conform to traditional gender roles. Multiple staff trainings, student awareness programs, policies regarding equal treatment and the like are also often part of the VRA. Overall, these agreements generally mandate that the district will allow a transgender student to participate in all aspects of school life as a member of the gender they identify with.[2] Such broad policies would appear to answer any questions regarding which restroom a transgender student may be allowed to use and on which sports teams they are allowed to compete (at least from the OCR's perspective), although some agreements indicate that these more "delicate" issues should be examined on a case-by-case basis, taking into account the "appropriateness" of the circumstances, the burdensomeness on the student and "to the extent possible" the student's wishes. Regardless, the OCR will continue to monitor, follow-up and intervene if it is determined that a district is allowing any type of discrimination to continue. Matters involving restroom accommodations and sports participation can result in significant community controversy, however, from the OCR's perspective, community unrest is not a justification for abrogating a particular student's civil rights.

With respect to case law guidance, there is one federal court ruling that suggests that students may have a First Amendment right to express their gender identity, as well as at least one state court opinion that held that students have a First Amendment right to wear clothing that conforms to their gender identity.[3] In addition, the U.S. Supreme Court has ruled, in a workplace context, that discrimination based upon an individual's nonconformity to gender stereotypes does constitute sex discrimination.[4] Likewise, the Supreme Court has also ruled that students enjoy protections from discrimination based upon gender stereotypes under the Equal Protection Clause.[5]

Several federal court cases have echoed these precedents, generally holding that discriminating against an individual due to the perception that they do not conform to traditional gender roles can establish a civil rights violation.[6]

[1] See www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf and www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[2] See www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf and www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf for examples of the VRAs reached between districts and the OCR.

[3] See *McMillen v Itawamba County School Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010)

[4] *Price Waterhouse v Hopkins*, 490 US 228 (1989)

[5] *United States v VMI*, 518 US 533 (1996)

[6] *Smith v City of Salem*, 378 F3d 566 (6th Cir. 2004)

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Some courts specifically defer to OCR guidance while evaluating such a claim.[7] These equal protection matters have been taken to a variety of federal appeals courts and none have dismissed them out of hand by holding that transgender individuals simply do not enjoy these protections.[8] Indeed, federal courts have generally sided with plaintiffs in finding that discrimination based upon an individual's failure to conform to sexual stereotypes can be actionable under the Equal Protection Clause and Title IX.[9]

State courts and agencies that have taken up the matter, including the Supreme Judicial Court of Maine[10], the Maine Human Rights Commission, the Colorado Division of Civil Rights[11] and the Superior Court of Massachusetts (in an unreported opinion)[12] have largely reached the conclusion (to varying degrees) that evidence of discriminatory treatment against a transgender student is an actionable civil rights violation and have held public school districts responsible (again, to varying degrees) for failing to provide transgender students with the same protections that would be afforded individuals who belong to other protected classes. Of note, California recently passed an amendment to its state education code to include specific language requiring schools to permit transgender students to participate in sex-segregated programs and use facilities consistent with the student's gender identity regardless of the gender that may be listed on their school records.[13] In Michigan, issues regarding transgender student rights have made headlines in several districts, with one particular matter involving several school districts as defendants having progressed to a Federal Title IX Complaint filed on behalf of the student at issue.[14] One of the involved defendant districts has filed a motion to dismiss the lawsuit that is based upon the argument that claims for sex discrimination by transgender plaintiffs must demonstrate evidence that defendants have engaged in "sex stereotyping." In that matter, the U.S. Attorney's Office has filed a statement of interest opposing the district's motion to dismiss; further solidifying the fact that federal government agencies believe that these are important civil rights matters in which they will continue to intervene.[15] In its Statement of Interest, the federal government reiterated the position that under Title IX and the Equal Protection Clause sex discrimination includes discrimination against transgendered individuals, prohibits discrimination based upon gender identity and transgender status, and prohibits discrimination based upon sex stereotypes. The U.S. Attorney's Office also makes a specific point of arguing that individuals who are in the process of transitioning from one gender to another still enjoy all of the same[16] protections, just as an individual transitioning from a belief in Christianity to a belief in Judaism would under freedom of religion doctrine. Obviously, a final judicial resolution to this particular situation is still well into the future.

The issue of equal protection for transgender students, as well as for those individuals who simply do not conform to gender stereotypes is only now starting to reach the national conciseness. While Michigan is not at the forefront with respect to legislation and judicial precedent in these matters, this does not mean that guidance, in the form of federal court decisions, DOE opinions and OCR resolutions, is not available. School districts should be aware of how the federal government has been proceeding in its investigations of these matters so that they might understand the potential ramifications of such and, hopefully, take appropriate steps from the outset in order to possibly avoid OCR involvement.

[7] *Biediger v Quinnipiac University,* 691 F. 3d 85 (2nd Cir. 2012)

[8] See *Rosa v Park W. Bank & Trust Co.*, 214 F 3d 213 (1st Cir. 2000), *Schwenk v Hartford,* 204 F 3d 1187 (9th Cir 2000) and *Glenn v Brumby,* 663 F 3d 1312 (11th Cir 2011).

[9] See *Pratt v Indian River Cent. Sch. Dist.*, 803 F Supp 2d 135 (NDNY 2011) and *Montgomery v ISD 709,* 109 F Supp 2d 1081 (D Minn 2000) among others.

[10] *Doe v Reg'l Sch. Unit 26*, 2014 ME 11, 86 A 3rd 600 (Me. 2014)

[11] *Mathis v Fountain-Fort Carson School District #8*, charge no. P20130034X (Colo. Div. Civil Rights June, 2013)

[12] *Doe ex rel. Doe v Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000), affirmed 2000-J-638, 2000 WL 33342399 (Mass. App Ct. Nov. 30, 2000)6

[13] AB-1266 Pupil Rights: sex-segregated school programs and activities, see: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266

[14] Complaint at https://genderidentitywatch.files.wordpress com/2014/12/tooley-v-van-buren-public-schools-et-al.pdf

[15] Statement at www.justice.gov/crt/about/edu/documents/tooleysoi.pdf

Collective Bargaining Under the 2011 PERA Amendments

Ryan Nicholson and Katherine Broaddus, Thrun Law Firm

The Michigan Legislature's 2011 amendments to the Public Employment Relations Act, the Teachers' Tenure Act and the Revised School Code, along with the creation of the Publicly Funded Health Insurance Contribution Act (PA 152 of 2011) have started to coalesce into case law and agency decisions. The scope of these new legal provisions and how they affect PERA's duty to bargain in good faith is becoming clearer. While these provisions give greater decisionmaking authority to schools, caution must still be taken to comply with remaining obligations under PERA.

I. Duty to Bargain Over PA 152 Compliance Methods

PA 152 requires public employers to limit their contributions to employee medical benefit plans by implementing either a "hard cap" or "80/20" cost-sharing compliance method (see MCL 15.561 *et seq.*). PA 152 applies to medical benefit plan years beginning on or after Jan. 1, 2012, unless the "grandfather" provision applies.[1] Several issues involving the selection of a compliance method and the impact of that decision on a bargaining unit or individual bargaining unit members have arisen with regard to PERA's good faith bargaining obligation. Recent decisions from the Michigan Employment Relations Commission and the Michigan Court of Appeals offer insight into how MERC and appellate courts will interpret PERA's good faith bargaining obligation in the context of PA 152.

In *Decatur Pub Schs v Van Buren Co Ed Ass'n* (2015), the Michigan Court of Appeals affirmed MERC's decision[2] that boards have the right to implement the "hard cap" compliance method after a collective bargaining agreement has expired to ensure compliance with PA 152. The Court of Appeals also agreed with MERC's finding that there is no duty to bargain over the choice between the "hard cap" or "80/20" compliance methods. Thus, even though a PA 152 compliance method relates to health insurance benefits (a mandatory bargaining subject), the decision as to which PA 152 compliance method a board will select is not a mandatory bargaining subject, and a board can select a compliance method at the expiration of a collective bargaining agreement to comply with PA 152.

In Decatur, the parties' collective bargaining agreement expired on June 30, 2012. The union demanded to bargain over health insurance, including the board's PA 152 compliance method. The parties bargained but were unable to reach agreement on a compliance method by PA 152's compliance deadline of July 1, 2012. In the absence of an agreement, the board unilaterally implemented the "hard cap" method on July 1, 2012, to ensure compliance with PA 152.[3]

The union filed an unfair labor practice charge alleging that the board unlawfully imposed health insurance "hard caps" and that the board was required to maintain the status quo under the expired agreement with respect to insurance premium allocations because health insurance benefits are a mandatory bargaining subject. The *Decatur* Court disagreed. The Court of Appeals found that PA 152 gives a public employer the discretion to unilaterally select its preferred PA 152 compliance method. *Id.*

But the *Decatur* decision did not address whether a duty exists to bargain the impact of a board's PA 152 compliance decision on a bargaining unit or individual bargaining unit members. MERC answered this question in *Shelby Twp,* 28 MPER 21 (2014), finding that the parties have a duty to bargain over the allocation of health insurance costs among employee groups.[4] Under PA 152, "…the public employer's costs are ***not*** determined by the amount the public employer pays for particular bargaining units or other groups of employees, but for all employees and public officials as a single group." *Id.* Under either compliance method, a public employer may "allocate" the employees' share of total health insurance costs among its different employee groups as long as the public employer does not contribute more than 80 percent toward the total health insurance costs of all employees, regardless of whether they are part of a bargaining unit or not. MERC explained that "…Act 152 does not regulate the allocation of the employees' share of the cost of medical benefit plans. This cost, just as before the adoption of Act 152, continues to be a mandatory subject of bargaining." *Id.*

Because selection of a PA 152 compliance method is a permissive and not a prohibited bargaining subject, MERC

[1] If a collective bargaining agreement or other contract, in effect before Sept. 27, 2011, is inconsistent with PA 152, PA 152 does not apply to the covered employees until the contract expires, is extended or renewed (MCL 15.565).

[2] MERC's decision in *Decatur Pub Schs* can be found at 27 MPER 41 (2014).

[3] Failure to comply with PA 152 results in a substantial financial penalty for the school district (MCL 15.569).

[4] This case is currently on appeal to the Michigan Court of Appeals, Docket No 323491.

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found that a board violated PERA when it unilaterally changed from the "80/20" compliance method to the "hard cap" compliance method during the term of a collective bargaining agreement that provided for implementation of the "80/20" compliance method (*Garden City Pub Schs,* 28 MPER 63 (2015)). In *Garden City,* the parties' agreement ran from Sept. 1, 2011 to Aug. 31, 2014, and required that the school district to pay 80 percent of the cost of health insurance benefits. The board passed a resolution effective July 1, 2012, adopting the "80/20" compliance method and renewed that decision in 2013.

However, effective Jan. 1, 2014, the board unilaterally changed both the health insurance plan specified in the agreement and the PA 152 compliance method to the "hard cap" method. The union filed a ULP charge alleging repudiation of the agreement.

The board defended its unilateral decision to change PA 152 compliance methods arguing that: (1) the choice of compliance methods is within its discretion; (2) the choice is a prohibited bargaining subject; and (3) the portion of the agreement providing for implementation of the 80/20 compliance method is unenforceable. MERC disagreed and noted that:

> By entering into a three-year contract that required the health care costs be shared based on an 80/20 division, Respondent agreed that its board would annually approve implementation of the 80 percent employer share option throughout the period covered by the contract. We agree with the ALJ that by not voting to approve the 80 percent employer share option for 2014, Respondent's board chose to repudiate its obligations under the parties' collective bargaining agreement and breached its duty to bargain in good faith. Because the school and union agreed to the PA 152 compliance method in their collective bargaining agreement, the school no longer had the discretion to select a PA 152 compliance method. Id.

MERC distinguished *Garden City* from *Decatur,* observing that the action taken by the *Decatur* board occurred after the collective bargaining agreement had expired and the deadline to implement a compliance method necessitated the need to act unilaterally.

A board's discretion to select a PA 152 compliance method does not rise to the level of discretion associated with prohibited bargaining subjects. A board may engage in bargaining over compliance methods (permissive), and any agreements reached on compliance methods are enforceable. Boards must negotiate (mandatory) the impact of the board's chosen compliance method on a bargaining unit or bargaining unit members. Bargaining the impact on the bargaining unit or bargaining unit members may include the specific insurance plan or provider and the employee's contribution within the elected cap.

II. Prohibited Bargaining Subjects are Unenforceable

In *Pontiac Sch Dist,* 27 MPER 60 (2014), MERC held that a board's repudiation of a settlement agreement on a prohibited bargaining subject did not violate the duty to bargain in good faith under PERA.[5]

To resolve a union grievance challenging the school district's decision to use long-term substitute teachers in lieu of recalling laid-off teachers, the board and the union entered into a settlement agreement. A week later, the district notified the union that it would not honor the terms of the settlement agreement. The union filed a ULP charge, alleging that the district violated its duty to bargain in good faith under PERA by repudiating the settlement agreement.

In affirming ALJ Stern's Decision and Recommended Order, MERC ruled that a settlement agreement providing recall rights for teachers is an agreement regarding a prohibited bargaining subject[6], about which the parties could not lawfully bargain. In her Decision and Recommended Order, ALJ Stern noted that:

> [A] public employer district cannot be found to have committed an unfair labor practice by repudiating a grievance settlement agreement on [a] (sic) prohibited topic, even if the employer entered into that settlement agreement after that topic had become a prohibited subject and the employer either knew or should have known that the agreement it had just signed would be unenforceable.

[5] This case is currently on appeal to the Michigan Court of Appeals, Docket No 321221.

[6] MCL 423.215(3)(j).

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The *Pontiac* decision and those noted below, illustrate MERC's reluctance to enforce any negotiated provision on a prohibited subject, whether in a CBA or settlement agreement.[7]

III. Prohibited Subjects at the Bargaining Table

MERC addressed the treatment of prohibited bargaining subjects at the bargaining table in *Ionia Pub Schs,* 28 MPER 58 (2014).[8]

In this case, both parties filed a ULP charge after the school district unilaterally removed prohibited subjects from the expiring collective bargaining agreement and stated that the content would not be replicated in the new agreement. The union disagreed, claiming that to remove the contested language from the expiring agreement, the parties must bargain over the prohibited subjects. The union refused to discuss the prohibited subjects and instead insisted that those provisions automatically become part of the successor agreement.

MERC ruled that the union, not the school district, committed a ULP. MERC also clarified and expanded upon several important issues about prohibited bargaining subjects. First, when a collective bargaining agreement expires, the board does not violate the duty to bargain in good faith by refusing to include prohibited content in the new contract.

Second, while it is not unusual for parties to bargain a new contract with an understanding that the existing contracted terms not raised in negotiations will be carried over, this approach is a bargaining convention rather than a legal requirement. The school district gave the union clear and repeated written notice that they would not carry over the prohibited subjects to the new contract and also carefully drafted proposals to omit the prohibited language.

Further, while prohibited subjects cannot be bargained, PERA permits discussion of those issues, particularly to identify language that cannot be continued in the new contract. MERC stated that the union's "baseless insistence" that the prohibited terms of the expired contract automatically transferred to the new contract, coupled with its refusal to even discuss the issues raised by that position was "simply an attempt to delay and obfuscate the bargaining process." *Id.*

Further, and perhaps most importantly, MERC clarified that while the union's insistence upon retaining the prohibited content unlawfully obstructed the bargaining process and violated the duty to bargain in good faith by demanding to bargain over prohibited subjects, the duty to bargain in good faith is also violated when the school district "clearly and unambiguously" indicates an unwillingness to bargain over the prohibited subjects and the union thereafter pursues those matters. Significantly, insistence by the union was not required to establish that the union committed a ULP.

This ruling is an important departure from previous MERC decisions requiring "insistence" on prohibited subjects as a predicate to a ULP. This case illustrates the need for school officials to make clear to the union early in the bargaining process that prohibited subjects and content cannot be included in the successor agreement.

In *Calhoun Intermediate Ed Ass'n*, 28 MPER 26 (2014)[9], the school officials gave the union clear and repeated written notice that they would not continue the prohibited provisions from the expired agreement in the new agreement. MERC ruled that the union's insistence on negotiating a prohibited subject at the bargaining table, over the school district's objection, violated PERA and constituted a ULP.

In *Calhoun*, the Association refused to remove prohibited bargaining subjects from the agreement and further complicated negotiations by offering package proposals that mixed mandatory, illegal and prohibited subjects into a single proposal. The union's proposals made it difficult for the ISD to distinguish between genuinely disputed mandatory bargaining subjects and those that the union raised solely as a bargaining chip in an effort to wrongfully retain prohibited subjects.

[7] Schools should still be mindful to remove prohibited bargaining subjects from agreements, if necessary, to qualify for "Best Practices Incentive Grants" (see MCL 388.1622f(2)(g)).

[8] This case is currently on appeal to the Michigan Court of Appeals, Docket No 325413.

[9] This case is currently on appeal to the Michigan Court of Appeals, Docket No 323873.

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The ISD challenged the union's insistence on including prohibited bargaining subjects in the collective bargaining agreement and carefully documented the union's continued insistence on the inclusion of prohibited bargaining subjects in the union's proposals. The ISD expressly objected to the union's insistence on bargaining prohibited subjects in proposals and responses to union proposals. The ISD warned the union that continued insistence on prohibited bargaining subjects would be viewed as a breach of the union's duty to bargain in good faith under PERA.

Despite the ISD's warning, the union persistently insisted on the inclusion of prohibited bargaining subjects in the agreement. The ISD filed a ULP charge. Both the ALJ and MERC agreed with the ISD that the union's insistence over prohibited bargaining subjects violated PERA.

MERC held that the ISD's requirement to bargain over mandatory bargaining subjects could not be "dependent upon the acceptance of provisions in an agreement which, by their terms, are forbidden by PERA's specific language" (*i.e.*, prohibited bargaining subjects). MERC found that the union's persistent demands to bargain over the prohibited bargaining subjects and conditioning of a successor agreement on the inclusion of prohibited bargaining subjects constituted bad faith bargaining.

Therefore, under *Calhoun,* the union's continued insistence on prohibited bargaining subjects after a school's demands to desist is a ULP. MERC further refined this holding in *Ionia* by stating that where the school officials "clearly and unambiguously" indicate their unwillingness to bargain over the prohibited subjects, the union commits a ULP by pursuing these matters further in negotiations. During negotiations, demands that the union cease such tactics should be clearly communicated and well documented.

A. Layoff/Recall Procedures

In *Pontiac School Dist,* 27 MPER 60 (2014), MERC ruled that a school did not breach its duty to bargain in good faith under PERA by failing to adhere to or bargain over the provisions of an expired collective bargaining agreement and the parties' past practices regarding layoff/recall and teacher placement as those procedures are prohibited bargaining subjects.[10]

The parties' expired agreement contained a provision governing reductions in personnel, layoff and recall (*e.g.*, timing and notice of layoffs). The past practice of the parties also established procedures relating to layoff and recall. Before reaching a successor agreement, the board promulgated a new layoff and recall policy for teachers under Section 1248 of the Revised School Code. The board then laid off teachers pursuant to its policy but in violation of the timing and notice provisions of the expired agreement and the parties' past practices.

The union filed a ULP charge alleging that the board repudiated the parties' agreement, specifically the layoff and recall provisions, and unilaterally changed existing terms and conditions of employment as set out in those provisions and as established by past practice when it laid off the teachers.

The ALJ and MERC disagreed with the union and dismissed the ULP charge finding that the board had no duty to bargain over the procedures relating to the layoff, recall or placement of teachers after the agreement's expiration. Because the provisions of the expired agreement and the parties' past practices regarding layoff and recall or teacher placement pertained to prohibited bargaining subjects, the board was no longer required to comply with those provisions and past practices.

B. Bid-Bump Procedures

MERC also held that a school district did not violate PERA by refusing to follow an expired collective bargaining agreement that required posting vacancies and holding a "bid-bump" meeting, *Ionia Pub Schs,* 27 MPER 55 (2014).[11]

In the ULP charges, the union alleged that the school district violated PERA by repudiating its contractual obligation when it refused to post vacancies and refused to hold a "bid-bump" meeting. The school district defended its actions arguing that relevant provisions of the contract, the vacancy postings and the "bid-bump" meetings, were not mandatory bargaining subjects, but instead were prohibited bargaining subjects under Section 15(3)(j) of PERA.

In affirming the ALJ's Decision and Recommended Order, MERC held that the school district had no duty to bargain

[10] This case is currently on appeal to the Michigan Court of Appeals, Docket No 322184.

[11] This case is currently on appeal to the Michigan Court of Appeals, Docket No 321728.

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over teacher placement decisions, including decisions regarding the ability of teachers to bid on other positions, to bump into positions or to take other action provided under the expired collective bargaining agreement associated with teacher placement. MERC stated:

> We further agree with the ALJ that Respondent has no duty to bargain over these issues. In fact, the parties are prohibited from doing so. In *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 487 (1995); *aff'd* 453 Mich 362 (1996), when discussing the amendments to PERA made by 1994 PA 112, the Court of Appeals concluded that what the Legislature "intended was to foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them or that they could ever become part of a collective bargaining agreement." The Court went on to explain that § 15(3) and (4) "evince a legislative intent to make public school employers solely responsible for these subjects by prohibiting them from being the subjects of unenforceable contract provisions and by eliminating any duty to bargain regarding them." *Id.* We find that same legislative intent to be present in the 2011 additions to § 15(3). *Id.*

MERC concluded that after PERA made teacher placement decisions a prohibited bargaining subject, contract provisions that applied to teacher placement were no longer mandatory bargaining subjects, but became prohibited subjects. Therefore, PERA did not require the school district to comply with the "bid bump" procedures contained within the expired contract, which included holding "bid-bump" meetings and posting vacant teaching positions.

IV. Arbitrating Prohibited Subjects

MERC held that a union breached its duty to bargain in good faith by initiating an arbitration to enforce prohibited bargaining subjects contained in a collective bargaining agreement, *Pontiac Public Sch Dist,* 28 MPER 34 (2014).

The parties' CBA, included specific procedures for a union member's layoff or involuntarily transfer to a new position. PERA prohibits bargaining over "any decision made by a public school employer regarding teacher placement or the impact of that decision on an individual employee of the bargaining unit."[12] At the beginning of the 2011-2012 school year, the school district laid off a teacher and unilaterally transferred her to a new position without following the expired agreement's layoff and transfer procedures. The union filed a grievance challenging the transfer and advanced the grievance to arbitration.

After the union submitted the issue to arbitration, the school district filed a ULP charge alleging that the union's attempt to enforce a prohibited bargaining subject in the expired agreement through the arbitration process violated PERA. The union argued that "teacher placement" did not include teacher reassignment, but only the initial teacher placement. MERC rejected the union's narrow definition of "placement" and, reiterating its previous decision in *Ionia,* stated that a prohibited bargaining subject gives boards broad placement discretion, including decisions related to reassignment, transfer or other actions taken to move employees to different positions.

MERC ruled that advancing a grievance covering a prohibited bargaining subject to arbitration was analogous to insisting on negotiating over a prohibited bargaining subject and, thus, violated PERA. MERC concluded that a union may not use the arbitration process to force an employer to go beyond the discussion stage of the grievance process to unlawfully enforce contract provisions or past practices that are unenforceable.

Many of the MERC decisions discussed in this article are subject to appeal. These decisions, and others addressing the arbitrability of prohibited bargaining subjects, such as disciplinary action, will have long-lasting implications for labor negotiations in public schools throughout the state.

[12] MCL 423.215(3)(j).