STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SANDUSKY COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case Nos. C08 I-198 & C08 I-201

-and-

SANDUSKY EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Luce, Basil & Collins, Inc., by Thomas Basil, Esq., for Respondent

White, Schneider, Young & Chiodini, P.C., by William F. Young, Esq., for Charging Party

DECISION AND ORDER

On July 15, 2009, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Tom Basil, Luce, Basil and Collins, Inc., for Respondent

White, Schneider, Young and Chiodini, PC, by William F. Young, Esq., 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 at Detroit, Michigan on January 27, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including a written stipulation of facts, testimony and other evidence presented at the hearing, and post-hearing briefs filed by the parties on or before April 15, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

These charges were filed by the Sandusky Education Association against the Sandusky Community Schools. Charging Party is the collective bargaining representative of Respondent's teachers. The parties' most recent collective bargaining agreement expired on July 31, 2008, and they began bargaining a successor in the spring of 2008. The charge in Case No. C08 I-198 was filed on September 25, 2008. It alleges that Respondent violated its duty to bargain in good faith by unilaterally withholding step increases due at the beginning of the 2008-2009 school year.

The charge in Case No. C08 I-201 was filed on September 26, 2008. It alleges that Respondent engaged in unlawful surface bargaining.[1]

Findings of Fact:

The collective bargaining agreement that expired on July 31, 2008, like the parties' previous agreements, included salary grids for each year of the contract. Each of these grids had twelve steps and four "rails," resulting in a grid with thirty-six cells. Teachers moved from one step to the next as they gained years of experience with Respondent. The rails represented educational attainment. Teachers moved to the second rail at the beginning of the school year following their completion of twenty hours of college credits beyond a bachelor's degree, to the third rail at the beginning of the school year following their attainment of a master's degree, and to the fourth rail at the beginning of the school year following their completion of twenty credits beyond a master's degree.

On February 28, 2008, Respondent delivered to Charging Party a set of written proposals for a new three year contract. Respondent's salary proposal was as follows:

> Wages: All returning staff members will receive the same dollar amount they received in 2007-2008.

The parties held their first actual bargaining session on or about April 10, 2008. At this meeting, Respondent reiterated that it was proposing a total freeze on wages, including step and rail increases. The parties also agreed to a set of ground rules for their negotiations. Although Charging Party proposed that the ground rules include an agreement that neither party would make any public comments until a tentative agreement was reached, Respondent would not agree to this.

The parties held one or two negotiating meetings between April 10 and the end of the 2007-2008 school year. At these meetings, the parties mostly discussed proposed contract language changes. On June 11, 2008, Charging Party presented Respondent with a comprehensive written proposal for a new contract. Charging Party proposed a five percent salary increase for each of the three years of the proposed contract.

Along with their June 12, 2008 paychecks, Charging Party's members received a letter from Respondent's school board. The letter stated:

> Initially the School System was facing a budget deficit for the 2008-09 school year. The administration and the union met three or four times to discuss and review who would be transferred and who the 9 ½ laid off teachers would be.[2]

[1] The second charge also alleged that Respondent violated its duty to bargain in good faith by attaching copies of both parties' bargaining proposals to paychecks received by Charging Party's members on or about June 12, 2008. In its brief, Charging Party does not argue that this action, standing alone, constituted a violation of the Act, but maintains that it should be considered along with Respondent's other conduct as demonstrating its lack of intent to reach a good faith agreement.

[2] Charging Party does not contend that the statements in this letter were inaccurate. However, some teachers who received layoff notices in the spring of 2008 were recalled to work in the fall. Six teachers were not recalled.

> The Board of Education will keep you informed as negotiations progress. If at any time you have any questions or concerns, we suggest you talk to your union representative.

Attached to the letter were copies of the bargaining proposals made by Respondent on February 28 and by Charging Party on June 11.

Since 2005, Respondent has had an internal policy requiring board members and administrators to keep information regarding the "progress, status or issues involved in negotiations" confidential unless authorized by a majority vote of the full board to serve as spokesperson to release information. The board did not take a formal vote before sending out the June 12 letter.

The parties held a total of eight bargaining sessions between April 10 and September 15, 2008. During this period, Charging Party gave Respondent a number of proposals which included new offers on economics.[3] During the summer, Charging Party repeatedly asked Respondent to make counter proposals, but Respondent responded, "We don't take turns." On August 7, 2008, Respondent gave Charging Party a second written proposal. This proposal did not include new offers on economic issues.

On August 28, Respondent made a package settlement offer that incorporated its previous offers, including the proposals it made on August 7, and a new proposal on health insurance. Respondent continued to propose a complete wage freeze, including no step increases. Later during the same bargaining session, Charging Party made a settlement offer that included proposals on salary and health insurance, and a proposal that the parties agree to limit their subsequent negotiations on contract language to four articles of the Respondent's choosing. The offer included a 1.5% salary increase for the first year of the contract, a 2.0% increase for the second year, and a 2.5% increase for the third year. Respondent rejected the package settlement. However, it did not indicate to Charging Party that it believed the parties were at impasse.

When Respondent's teachers move up a step and/or over a rail on the salary grid, they usually see this reflected in their first paycheck after the new school year begins. Only three teachers received salary increases in their first paycheck of the 2008-2009 school year. These three teachers had reported changes in their educational attainment to Respondent between August 2007 and August 2008, and the increases they received reflected a move one rail to the right on the salary grid. However, Respondent subsequently notified the three teachers that the increases were an error and reduced their pay. These teachers were also told that sometime in the future their pay would be reduced to allow Respondent to recoup what it had mistakenly paid them.

Carlson has worked for Respondent since the 2001-2002 school year. He testified that the 2008-2009 school year was the first year during his tenure that eligible teachers did not receive step increases at the beginning of the year. Carlson recalled that at the beginning of the 2004-

[3] Carlson testified that Charging Party made nine economic proposals during the course of negotiations, but did not indicate how many it made before September 2008.

2005 or 2003-2004 school year, the parties did not have a contract and the teachers' first paycheck of that year did not include their step increases. According to Carlson, however, Respondent agreed to pay the increases after Charging Party met once with the superintendent.

The parties met again on September 15, 2008. Carlson was the only witness to testify regarding this meeting. Charging Party made a proposal at that meeting that included new offers on salary and benefits. Carlson testified initially that Charging Party "essentially" received no counterproposal from Respondent at this meeting. He then said that when Charging Party asked for a counter, Respondent told Charging Party that its last proposal was its counter. However, Carlson also testified on direct that Respondent gave Charging Party a third proposal on economics, and that he could not remember whether Charging Party received it on September 15 or October 1. When asked on cross examination if Respondent gave Charging Party a proposal on September 15, Carlson again said he did not remember. He was then handed a copy of a document titled, "Sandusky Board of Education – Proposal Package – September 15, 2008 – 8:00 pm." This proposal included an offer of a 1% salary increase in the third year of the contract only. Carlson initially identified the document as a proposal Charging Party received at the September 15 meeting, but immediately changed his mind and said that he did not recall the document.[4] He testified, however, that Respondent did offer a 1% raise to each step of the salary schedule.

Near the end of the September 15 meeting, Respondent asked Charging Party if it had any other offers to make. Charging Party said no, and told Respondent that it wanted to end the session and poll its members on the direction they wanted Charging Party to take. When Charging Party asked Respondent for dates for the next meeting, Respondent said that it would not meet unless Charging Party had a new proposal for that meeting. Carlson testified that Respondent's chief negotiator, Tom Basil, said something like Respondent "would need a gun to our heads" to meet again. However, the parties met again on October 1. At the end of that meeting, Basil indicated that he believed the parties were at impasse, and threatened to implement Respondent's last offer. At the time of the hearing in January 2009, however, Respondent had not taken action to implement, and the parties were still meeting.

Discussion and Conclusions of Law:

Section 15(1) of PERA, which defines the duty to bargain under the Act, states explicitly that the Act does not "compel either party to agree to a proposal or require the making of a concession." Respondent points out that throughout negotiations it consistently proposed a total freeze on wages, including step increases, for all employees during the 2008-2009 school year. It argues that requiring it to pay step increases to employees at the beginning of the 2008-2009 school year would effectively obligate it to concede its position on the wage freeze.

Under PERA and the National Labor Relations Act (NLRA) 29 USC 105 et seq, parties are prohibited from making changes in wages, hours or other existing terms and conditions of employment after the expiration of their collective bargaining agreement until the they either reach agreement or a good faith bargaining impasse. See *Local 1567, IAFF v Portage,* 134

[4] Cindy Fraley, a member of Charging Party's bargaining team who routinely kept copies of all the parties' proposals, testified that she did not recognize the document.

Mich App 466, 472 (1984), and cases discussed therein; *Ottawa Co v Jaklinski*, 423 Mich 1, 12-13 (1985). In the 1980s, the Commission and the Court of Appeals first held that an employer's duty to maintain the status quo prior to impasse can include an obligation to pay salary increases. The first decisions involved automatic cost of living adjustment (COLA) payments. At that time, collective bargaining agreements often provided that employees were entitled to receive COLA payments, either as a lump sum or as increase to base wages, when federal consumer price indexes rose. In *Portage, supra,* the employer argued that its duty to make COLA adjustments terminated with the expiration of the contract. The Court of Appeals, however, concluded that the COLA formula itself constituted a term or condition of employment. It stated, at 474:

> A review of the COLA provision herein plainly indicates that a policy or practice of making periodic adjustments to the wages of the employees was established as per the schedule/formula set forth in the said provision. As such, the COLA provision clearly had a significant impact on the wages and conditions of employment of the employees herein so as to be a "mandatory subject" of bargaining which survived the expired contract during the bargaining process. See *Office & Professional Employees International Union, Local 2 v Washington Metropolitan Area Transit Authority,* 552 F Supp 622, 633-634 (DDC, 1982). The phrase of the contract "*for the life of the agreement*," therefore could not terminate the policy or practice established by the COLA provision during the bargaining process any more than it could terminate a wage itself during the process. *National Labor Relations Bd v Haberman Construction Co,* 618 F 2d 288, (CA 5, 1980), *rev'd on reh. on other grounds* 641 F.2d 351 (CA 5, 1981); *Bay Area Sealers,* 251 NLRB No. 17 (1980). We, therefore, hold that where a COLA provision establishes a practice or policy of making regular COLA adjustments to wages which has a significant impact on the said wages or other conditions of employment so as to be a "mandatory subject" of bargaining, the provision survives the expiration date of the contract during the bargaining process as a matter of law pursuant to PERA.

The Court of Appeals reversed the Commission's dismissal of the charge against the employer in *Portage.* However, by the time of the Court's decision, the Commission had changed its position and agreed with the Court that a COLA formula was a term and condition of employment. See *Wayne Co,* 1984 MERC Lab Op 17. Later that same year, in *Detroit Public Sch Dist, (Bus Drivers and Site Management Unit),* 1984 MERC Lab Op 579, the Commission held that a salary grid which establishes wage rates or salaries for employees in accordance with the number of years or service, or the completion of educational requirements, is also a condition of employment that cannot be changed without satisfying the obligation to bargain. The Commission stated, at 581, "The wage structure is as much a condition of employment as the wage level set by contract."

In *Jackson Cmty College,* 1989 MERC Lab Op 913, a union filed a charge after the employer refused to pay step increases in accord with the salary grid in an expired contract. In that case, the union had proposed to reduce the number of steps in the salary grid. The administrative law judge recommended dismissal of the charge based, in part, on the fact that the parties were bargaining over the salary grid at the time the step increases were due to be paid. The Commission concluded that this fact had no significance, and held that the employer

violated its duty to bargain by failing to pay step increases in accord with the salary grid in effect when the contract expired. In *Jackson Cmty College Classified and Technical Ass'n v Jackson Cmty College,* 187 Mich 708 (1991),the Court of Appeals affirmed the Commission, citing *Portage* and a subsequent decision involving COLA adjustments, *Wayne Co Government Bar Ass'n v Wayne Co,* 169 Mich App 480 (1988).

As discussed above, it is now well established that a salary grid which provides for step increases for experience and/or educational attainment is itself a term and condition of employment which remains in effect until altered by agreement of the parties or by employer action after a valid impasse. In this case, therefore, the salary grid for the 2007-2008 school year represented the status quo, and Respondent's proposal to eliminate step increases for the 2008-2009 school year was a proposal to reduce existing compensation levels. Like any other such proposal, it could not be unilaterally implemented before the parties reached impasse.

Respondent argues that when an employer's budget situation forces it to seek wage freezes or wage reductions from its employees, requiring it to pay step increases until it reaches a contract may force the employer into bankruptcy. At best, it argues, requiring an employer to pay step increases removes any incentive for the union to reach a contract settlement. The answer to Respondent's first argument is that when bargaining a contract, a public employer is expected to know what PERA requires and make decisions based on that knowledge. That is, an employer should realize that it may have to pay step increases while bargaining and formulate its bargaining proposals to take this into account, even if this means proposing salary reductions for later in the contract. Respondent's second argument is also unpersuasive. A union's incentive to reach agreement is obviously less when the employer proposes a "give back" than when both parties have proposed salary increases. Nevertheless, even in this situation the union has an interest in avoiding layoffs that may result if the parties do not agree to salary concessions.

Respondent does not allege that the parties were at impasse when it refused to pay step and rail increases in accord with the existing salary grid at the beginning of the 2008-2009 school year. I conclude that Respondent violated its duty to bargain in good faith by this action since it constituted an unlawful unilateral change in existing wages, hours, and terms and conditions of employment.

The charge in Case No. C08 I-201 alleges that Respondent engaged in unlawful surface bargaining. To determine whether a party has bargained in good faith, the Commission examines the totality of the circumstances to decide whether a party has approached the bargaining process with an open mind and a sincere desire to reach agreement. See, e.g., *City of Springfield,* 1999 MERC Lab Op 339, 403; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44 (1974).

In support of its argument that Respondent lacked an open mind and a sincere desire to reach agreement, Charging Party cites Respondent's letter of June 12, 2008, the fact that it made only three economic proposals while Charging Party made nine, its refusal to present Charging Party with a counterproposal on September 15, 2008, and Basil's statement on that date that Respondent would "need a gun to its head" to agree to another meeting.

An employer does not violate its duty to bargain in good faith when it communicates factual information about the parties' bargaining positions to its employees in a noncoercive

manner. *Melvindale-Northern Allen Park Pub Schs,* 1992 MERC Lab Op 400; *Huron Sch Dist,* 1990; *Bangor Twp Bd of Ed,* 1984 MERC Lab Op 274. The proposals attached to Respondent's June 12, 2008 letter to employees were proposals that had been made by both parties at the bargaining table. Respondent did not solicit employees' opinions or attempt to engage them in direct discussion about the terms of the contract, and the letter did not disparage Charging Party or the bargaining process. Charging Party does not contend that the statements made in the letter, including the comments made about layoffs and deficits, were inaccurate. Rather, it contends that the letter was an attempt to "bully" the employees into accepting Respondent's offer. Clearly, Respondent intended to remind employees of its ongoing financial problems. However, I find that the June 12, 2008 communication was not coercive in nature. Compare *Jackson Co,* 18 MPER 22 (2005).

I also conclude that the evidence as a whole does not support a finding that Respondent approached negotiations without an open mind and sincere desire to reach agreement. Although Respondent did not move from its position that wages should be frozen for all three years of the agreement until September or October 2008, it did not maintain a fixed position on all issues. The fact that Respondent did not counter every Charging Party offer is not evidence of bad faith, especially as the parties were apparently still far apart on wages. Moreover, despite Basil's statement on September 15, the parties in fact continued to meet and bargain. I conclude that Charging Party did not meet its burden of showing that Respondent engaged in unlawful surface bargaining, and I recommend that the Commission dismiss the charge in Case No. C08 I-201.

In accord with the findings of fact and conclusions of law above, I recommend that the Commission find that, as alleged in Case No. C08 I-198, Respondent unilaterally altered existing terms and conditions of employment when it refused, at the beginning of the 2008-2009 school year, to pay step and rail salary increases due employees under the terms of the existing salary grid. I also recommend that the Commission issue the following order:

RECOMMENDED ORDER

Respondent Sandusky Community Schools, its agents and officers, are hereby ordered to:

1. Cease and desist from:

   a. Refusing to bargain with the Sandusky Education Association, the recognized bargaining agent for its teachers, by making unilateral changes in existing wages, hours and existing terms and conditions of employment;

   b. Unilaterally altering existing compensation levels by refusing to pay step and/or rail increases due employees under the salary grid established by the parties' expired agreement.

2. Take the following actions to effectuate the purposes of the Act:

   a. Pay step and rail increases as required by the expired agreement until the parties reach agreement on the terms of a new contract or reach a good faith bargaining impasse;

b. Make employees whole for loss of wages suffered by them as a result of Respondent's unlawful unilateral action in September 2008, including interest at the statutory rate of five percent per annum, computed quarterly;

c. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____