STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAVERLY COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C11 K-206
-and- Docket No. 11-000588

INGHAM COUNTY EDUCATION ASSOCIATION/
WAVERLY EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Kevin S. Harty, for Respondent

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue, for Charging Party

DECISION AND ORDER

On July 10, 2012, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Waverly Community Schools, did not breach its duty to bargain when it refused, at the beginning of the 2011-2012 school year, to make salary adjustments to reflect the increased educational attainment of nine members of the bargaining unit represented by Charging Party, Ingham County Education Association/Waverly Education Association. The salary adjustments were provided for in the parties' expired collective bargaining agreement. The ALJ found that Respondent had not violated § 10(1)(a) or (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) or (e), as alleged in the charge, and recommended that the charge be dismissed. This matter required the ALJ to interpret the provisions of 2011 PA 54 (Act 54), which amended PERA at § 423.215b, and prohibits wage increases between contract expiration and the commencement of a successor agreement. The ALJ found that the prohibition against wage increases following the expiration of a collective bargaining agreement in § 15b of PERA includes increases based on enhanced educational credentials and that Respondent had no obligation to pay such increases after contract expiration.

The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA. Charging Party filed exceptions to the ALJ's Decision and Recommended Order on September 4, 2012. On October 5, 2012, Respondent filed its brief in support of the ALJ's Decision and Recommended Order and requested oral argument.

In its exceptions, Charging Party contends the ALJ erred by finding that wage increases for educational attainment are included in the prohibition against payment of wage step increases after contract expiration. Further, Charging Party asserts that the ALJ found the language of Act 54 to be ambiguous and engaged in "administrative construction" contrary to rules of statutory interpretation. Charging Party disagrees with the ALJ's determination that Act 54 does not have to be harmonized with recent legislative enactments that Charging Party contends show legislative intent to encourage teachers to further their education. Moreover, Charging Party claims the ALJ erred by failing to consider that interpreting Act 54 to prohibit payment of wage increases for educational advancement after contract expiration is an unconstitutional deprivation of property rights. In its brief in support of the ALJ's decision, Respondent asserts that the ALJ correctly interpreted Act 54 and properly concluded that after the expiration of the collective bargaining agreement Respondent had no obligation to pay salary increases based on educational advancement. Respondent also agrees with the ALJ that determining the constitutionality of Act 54 is not within the Commission's jurisdiction. However, Respondent asserts that if the Commission addresses the constitutional issue, we should find Act 54 is constitutional and was applied constitutionally by the ALJ.

We have considered the arguments made in support of Charging Party's exceptions and find them to be without merit.

After reviewing the exceptions and the response to the exceptions, we find that oral argument would not materially assist us in deciding this case. Therefore, Respondent's request for oral argument is denied.

Factual Summary:

Charging Party, the Ingham County Education Association/Waverly Education Association represents a bargaining unit of teachers and certain other professional personnel employed by Respondent, Waverly Community Schools. Respondent and Charging Party are parties to a collective bargaining agreement that expired on June 30, 2011. Employees covered by that agreement received salary adjustments based on increases in their level of educational achievement and years of experience. The contract provided eleven vertical salary steps based on years of experience and six horizontal salary "lanes" based on level of education. When the parties' agreement expired on June 30, 2011, they had not reached a successor agreement.[1] After the expiration of the agreement, nine employees provided timely notice and evidence of educational achievement on which they sought horizontal salary lane increases. Based on Act 54, Respondent declined to advance these nine employees on the horizontal salary lanes based on education.

Discussion and Conclusions of Law:

Prior to the effective date of Act 54, it was well-settled that when a collective bargaining agreement expired, a public employer had the continuing obligation to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reached agreement or impasse. *Local 1467, IAFF v City of Portage,* 134 Mich App 466, 472; 352 NW2d 284 (1984),

[1] As of the date the ALJ's Decision and Recommended Order was issued, the parties had not reached a successor agreement. However, Charging Party informed us on October 4, 2012, that an agreement has been reached.

lv den 422 Mich 924 (1985). See also *Wayne Co Gov't Bar Ass'n v Wayne Co*, 169 Mich App 480,485-486; 426 NW2d 750 (1988); 1 MPER 19105 aff'g 1987 MERC Lab Op 230; *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94; 393 NW2d 889, 892 (1986). Thus, before Act 54 was enacted, mandatory subjects of bargaining, such as cost of living adjustments (COLA) and step increases, survived the contract by operation of law during the bargaining process unless there was a clear and unmistakable waiver. *MESPA v Jackson Cmty College*, 187 Mich App 708 (1992), aff'g 1989 MERC Lab Op 913; *City of Portage*.

Act 54, which became effective on June 8, 2011, provides in relevant part:

> (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits.

The passage of Act 54 altered the duty to bargain under PERA by eliminating a public employer's duty to make automatic salary adjustments after contract expiration. Because a public employer's duty to bargain is a duty created by statute, the Legislature has the authority to limit that duty. *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). Thus, the Legislature has the authority to eliminate a public employer's duty to make wage adjustments after contract expiration. It expressly eliminated a public employer's duty to make wage step increases after contract expiration. The issue before us is whether, in so doing, the Legislature intended to end public employers' duty to make wage adjustments based on educational advancement after contract expiration.

Charging Party asserts that the ALJ found the language of Act 54 to be ambiguous and, therefore, engaged in "administrative construction" of Act 54. We disagree. We find no ambiguity in the language of Act 54 with respect to the issue before us, nor did the ALJ state that she found Act 54 to be ambiguous. While finding no ambiguity in the language of the Act eliminates the need to consider legislative history or other means of statutory interpretation to determine the legislative intent, such a finding does not preclude review of the statute's wording. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996); *Luttrell v Dep't of Corrections*, 421 Mich 93, 365 NW2d 74 (1984). Accordingly, we find no error in the ALJ's examination of the language used by the Legislature in Act 54. The most reliable evidence of the Act's intent is the statute's wording. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648, 650 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Where there is no statutory definition of the words used in the statute, those words and phrases must be given their plain and ordinary meaning. *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 538-539; 565 NW2d 828, 831 (1997); *Bingham v American Screw Products Co*, 398 Mich 546, 563; 248 NW2d 537 (1976).

In its brief on exceptions, Charging Party argues: "The Commission has long recognized a distinction between step increases and lane/rail changes." Charging Party relies on *Sandusky Cmty Sch*, 22 MPER 90 (2009) (no exceptions), and *Ida Pub Sch*, 1996 MERC Lab Op 211, 9 MPER 27062 (1996) to support this assertion. Charging Party points to language in *Sandusky Cmty Sch* where the ALJ stated: "Respondent does not allege that the parties were at impasse when it refused to pay step and rail increases" as an indication that the Commission distinguishes between "step increases" and "rail increases." However, it is clear from the ALJ's discussion of the facts in that case that she merely used the terminology from the parties' collective bargaining agreement in referring to differences in levels on the salary grid, as she stated elsewhere in the decision:

> [I]t 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, . . . Respondent's proposal to eliminate step increases for the 2008-2009 school year was a proposal to reduce existing compensation levels.

Charging Party also points out that in *Ida Pub Sch*, the ALJ's Decision and Recommended Order states:

> I find that throughout four meetings, neither side showed any flexibility with respect to wage freezes and impasse on this issue had been reached. The employer, therefore, did not commit an unfair labor practice by discontinuing step increases, lane changes, and longevity payments for the 1994-95 school year.

However, in the Commission decision adopting the ALJ's recommended order, the Commission made no reference to "lane changes." Instead, the Commission referred to the results of the employer's wage freeze as a refusal to pay "various types of step and longevity increases." *Ida Pub Sch* at 212. Accordingly, we find the "distinction" that Charging Party asserts as relevant in the treatment of step increases and lane changes or rail increases is one without a significant difference for our purposes here.

In *Warren Consol Sch*, 1975 MERC Lab Op 129, 132, the Commission concluded that the employer's refusal to pay wage increases provided by the salary grid of the expired contract was not unlawful as the Commission, at that time, considered those provisions to have expired with the contract. The salary grid in that case provided that each employee would be paid during the existence of the contract according to their years of service or educational achievement. See *Warren Ed Ass'n*, 1975 MERC Lab Op 76, 88. The Commission revisited the issue of whether salary grids in expired contracts must be adhered to between contract expiration and the effective date of a new contract in *Detroit Pub Sch, (Bus Drivers & Site Mgmt Units)*, 1984 MERC Lab Op 579. There, the Commission reversed its decision in *Warren Consol Sch* and held that "a salary grid which establishes wage rates or salaries for employees in accordance with the number of years of service (or the completion of educational requirements) is itself a condition of employment that cannot be changed without bargaining." *Detroit Pub Sch*, at 581. In *Jackson Cmty Coll*, 1989 MERC Lab Op 913, 915-16, aff'd 187 Mich App 708 (1991), the Commission discussed its decision in *Detroit Pub Sch* stating:

> We held that a salary grid upon which employees are paid increments based on educational achievement or years of service is as much an existing term and condition of employment as the employees' "accrued" wage rate, and therefore cannot be altered or repudiated short of impasse or agreement.

In *Sandusky Cmty Sch*; *Jackson Cmty Coll*; and *Detroit Pub Sch*, the employer was required to pay wage increases, whether due to increased experience or educational advancement, upon the occurrence of a designated event. Wage increases based on increased experience differ from wage increases based on educational attainment since employee entitlement to the respective increases results from the achievement of a different condition. However, both kinds of increases result from the achievement of a contractually specified goal by an employee. This Commission has made no distinction between the legal effects of these types of provisions as mandatory subjects of bargaining. We have not found that a contractual provision requiring payment of a wage increase after an employee reaches a certain level of experience or years of service is either more or less entitled to enforcement than a provision granting a wage increase based on educational advancement. Where a wage increase is due based on increased experience, the employer has no discretion in paying that wage increase to an employee who meets the collective bargaining agreement's experience requirement for that wage level. Similarly, where a wage increase is due because an employee has earned additional educational credit or an advanced degree that, under the collective bargaining agreement, entitles the employee to receive wages at a higher level, the employer has no discretion in paying the increased wages once the employee has met the contract's educational requirement for the higher wage. In both circumstances, the employer is bound by the contract's requirements and must pay the higher wage when the precondition for the wage increase has been met by an employee. In this case, as is typical with public school teachers, the salary grid provides for increased wages upon the happening of a certain event, which could either be educational achievement, increased years of service, or both. As in cases involving cost of living adjustment provisions, the key factor in the cases that required employers to pay post-contract-expiration wage increases for increased experience or educational advancement has been that the wage increase was based on a salary grid, policy, or practice that was part of the parties' collective bargaining agreement. See e.g. *Mid-Michigan Cmty Coll*, 1988 MERC Lab Ops 471, 474. See also *Wayne Co Gov't Bar Ass'n v Wayne Co*, 169 Mich App 480, 486-487; 426 NW2d 750 (1988) aff'g 1987 MERC Lab Op 230.

It is a well-established principle of statutory construction that the legislature is presumed to be aware of statutory interpretations by the courts and by the administrative bodies charged with statutory enforcement. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704, 714 (1991); *Melia v Appeal Bd of Michigan Employment Sec Comm*, 346 Mich 544, 565-566; 78 NW2d 273, 276-277 (1956); *Parker v Bd of Ed of Byron Center Pub Sch*, 229 Mich App 565, 570-571; 582 NW2d 859, 862 (1998). When examining the question of whether a wage step increase is a mandatory subject of bargaining, this Commission has frequently included within the category of wage step increases those wage increases due to educational achievement, which are sometimes referred to as lane changes or rail increases. See *Sandusky Cmty Sch*, 22 MPER 90 (2009) (no exceptions); *Jackson Cmty Coll*, 1989 MERC Lab Op 913, 915-16, aff'd 187 Mich App 708 (1991); *Detroit Pub Sch, (Bus Drivers & Site Mgmt Units)*, 1984 MERC Lab Op 579, 581; *Warren Consol Sch*, 1975 MERC Lab Op 129, 132; *Warren Ed Ass'n*, 1975 MERC Lab Op 76, 88. Until this decision and our decision in *Bedford Public*

Schools-and- Bedford Education Association, MEA/NEA, Case No. C11 L-211, which is being issued concurrently with this decision, this Commission has not distinguished between wage increases based on educational advancement and wage increases based on increased experience. Inasmuch as the Legislature is presumed to be aware of this Commission's interpretations of PERA, we cannot assume that the Legislature would distinguish between wage increases based on experience and wage increases based on educational achievement any more than we have.

Unlike the unconditional wage increases that are included in a collective bargaining agreement and take effect at mutually agreed intervals, step increases take effect only upon the occurrence of a condition precedent: an employee's attainment of a level of experience that is usually measured in years of service to the employer. COLA increases, too, take effect only upon the occurrence of a condition precedent: an increase in the cost of living. Like step increases and COLA increases, the wage increases at issue here are triggered by the occurrence of a condition precedent: an employee's educational achievement usually measured in terms of academic advancement. Accordingly, we find that Act 54 prohibits the payment of wage step increases whether based on increased years of service or educational advancement. The "lane changes" at issue here are included within the prohibition against payment of "wage step increases" in Act 54.

Charging Party argues that the Legislature could have included wage increases based on educational achievement in the sentence that reads, "The prohibition in this subsection includes increases that would result from wage step increases." Given this Commission's common treatment of both wage increases based on increased experience and those based on educational achievement, it was not necessary for the Legislature to add the language urged by Charging Party. By reviewing the plain language of the Act, the ALJ correctly concluded that wage increases based on educational achievement, like wage increases based on increased experience, are included in the prohibition against post-contract-expiration wage increases in Act 54.

Charging Party also asserts that the ALJ erred in finding "[I]t seems evident that, under a salary schedule similar to the one in this case, an employer might in some years have to pay more for lane change increases than for step increases based on increased experience." Charging Party argues "Taking into account the relatively small number of teachers who earned a lane change this year, it is counterintuitive to find that the Legislature intended to penalize those teachers earning lane changes by withholding the increase until a new collective bargaining agreement is negotiated." It is conceivable that under certain circumstances a public school employer may indeed have to pay more for lane change increases in some years than for experience-based step increases, but it is not relevant to our inquiry herein. Inasmuch as the statement to which Charging Party excepts was made by the ALJ to explain the difference between her interpretation of Act 54 and the interpretation of the ALJ in *Bedford Public Schools,* finding that wage increases based on educational attainment affect a smaller percentage of the workforce, we find no error. However, without evidence establishing that the Legislature considered data showing the percentage of teachers in all Michigan public school districts who have earned educational-achievement-based lane changes versus the percentage who have earned experience-based step increases, we are unwilling to speculate that such data was considered by the Legislature in determining which wage increases would be covered by Act 54. The number of bargaining unit members who were denied educational-achievement-based lane changes in

this case, or in *Bedford Public Schools -and- Bedford Education Association, MEA/NEA*, Case No. C11 L-211, is not relevant to determining legislative intent.

Charging Party argues that other recent legislative enactments demonstrate legislative support for enhanced training for teachers. We agree with the ALJ that because Act 54 and the statutes cited by Charging Party deal with different subjects, there is, therefore, no need to harmonize them. Charging Party also argues that interpreting Act 54 to prohibit salary lane changes after contract expiration would be an unconstitutional deprivation of property rights. This Commission is not charged with the authority to address the constitutionality of legislative enactments. *Michigan State Univ*, 17 MPER 75 (2004). We decide this matter based on the language of PERA and its amendments.

For the reasons stated above, we hold that Respondent had no obligation under PERA to pay salary increases based upon educational achievement to members of Charging Party's bargaining unit during the period between the contract's expiration and commencement of the parties' successor collective bargaining agreement. We have carefully considered all other arguments submitted by the parties and conclude that they would not change the result in this case. The ALJ's Decision and Recommended Order is affirmed.

ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAVERLY COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C11 K-206
Docket No. 11-000588

-and-

INGHAM COUNTY EDUCATION ASSOCIATION/
WAVERLY EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Kevin S. Harty, for Respondent

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On November 29, 2011, the Ingham County Education Association/Waverly Education Association filed the above charge with the Michigan Employment Relations Commission (the Commission) against the Waverly Community Schools. Charging Party represents a bargaining unit of contracted professional teaching personnel and certain other professional employees of Respondent. The charge alleges that Respondent violated §§10(1)(a) and (e) of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 by refusing to adjust the salary of nine members of Charging Party's bargaining unit at the beginning of the 2011-2012 school year to reflect their increased educational attainment, as provided for in the salary schedule contained in the parties' expired collective bargaining agreement. Pursuant to Section 16 of PERA, the case was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS).

The issue in this case is whether an amendment to PERA adopted by the Legislature on June 8, 2011, 2011 PA 54 (hereinafter Act 54) authorized Respondent to take the above action without Charging Party's agreement or a good faith bargaining impasse. On February 14, 2012, the parties submitted a stipulated record, including a statement of stipulated facts and attached exhibits, in lieu of a hearing on the charge. On March 2, 2012, both parties submitted briefs supporting their positions. On March 26, 2012, both filed reply briefs. On June 19, 2012, Charging Party filed a statement of supplemental authority citing the Decision and

Recommended Order issued by MAHS ALJ Doyle O'Connor in *Bedford Pub Schs*, (Case No. C11 L-211/Docket No. 11-000642) on June 6, 2012. ALJ O'Connor concluded in that decision that Act 54 did not prohibit the payment of salary adjustments based on increased educational attainment, and found that the employer in that case violated its duty to bargain by failing to make those adjustments after the collective bargaining agreement expired. On June 22, 2012, Respondent submitted a letter expressing its disagreement with the conclusion reached by ALJ O'Connor in *Bedford*. Based upon the entire record, including the facts contained in the stipulated record and as set forth below, and the briefs filed by the parties, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

The parties' stipulated as follows:

The Board of Education of the Waverly Community Schools (hereinafter "Board" or "District") and the Ingham-Clinton Education Association/Waverly Education Association, MEA/NEA (hereinafter "Association") are parties to a collective bargaining agreement which expired on June 30, 2011.

The contract between the parties covers:

> All full time and regular part time contracted professional teaching personnel, counselors, school social workers, school psychologists, and coordinators, that are certified, licensed, registered, or approved by the Michigan Department of Education or an appropriate governmental agency, and employed by the Board of Education of the Waverly Schools, including teachers on tenure and probation, but excluding all personnel with the power to hire, dismiss, or effectively recommend the hiring or dismissal of personnel, as well as administrators, supervisors, substitute, nurses, aides, noncertified personnel, and all other employees.

Article 8 (Professional Compensation) and Appendix A of the 2010-2011 Master Agreement set forth how employees are compensated. Employees are compensated based on their credited years of experience and their level of education. There are 11 vertical steps based on the number of credited years of experience.[2] There are also six horizontal "lanes" based on an employee obtaining the following education: Bachelor's degree, Bachelor's degree plus 20 additional college credit hours earned, Master's degree, Master's degree plus 15 additional credit hours, Master's degree plus 30 additional credit hours, and Master's degree plus 45 additional credit hours.

Pursuant to Article 8, Section 8.6 of the Master Agreement, a teacher must submit documentation to the District showing they have obtained a certain educational level in order to advance to a higher horizontal salary lane.

[2] According to the expired collective bargaining agreement submitted as an exhibit, there are actually 23 vertical steps. The progression, according to the contract, is as follows: Step 0, Step .5, Step 1, Step 1.5, etc. and so on to Step 11.

The parties began bargaining for a successor collective bargaining agreement to their 2010-2011 Master Agreement on April 21, 2011.

Upon expiration of the 2010-2011 Master Agreement on June 30, 2011, the parties had not reached a successor agreement. As of the date the stipulation was submitted, although the parties continued to bargain, they had not arrived at a successor agreement.

Nine employees who were seeking to move to a higher horizontal educational lane subsequent to the expiration of the 2010-2011 Master Agreement provided timely notice of their educational advancement and documentation to confirm their eligibility for salary lane advance to the Board pursuant to the timelines established in Article 8 of the 2010-2011 Master Agreement.

On September 6, 2011, the Board's assistant superintendent sent identical letters to each of these nine employees and the Association indicating the District's belief that it could not provide salary increases, including salary "lane" advancement, to them based on 2011 PA 54, MCL 423.215(b).

But for the Board's opinion that 2011 PA 54 barred it from granting salary increases based on moving to a higher horizontal lane, the nine employees would have been granted those increases based on their educational advancement.

In the past, employees within the Association's bargaining unit who have submitted evidence of qualifying academic attainment for horizontal lane changes have received pay adjustments at the beginning of the academic year.

In addition to the above stipulated facts, the parties submitted a copy of their 2010-2011 Master Agreement, the letter referenced in paragraph eight of their stipulation, and, as evidence of the legislative history of Act 54, the following versions of that statute prior to its passage:

1. House Bill #4152 introduced on January 26, 2011

2. Substitute for House Bill #4152 as passed by the House of Representatives on March 10, 2011.

3. Substitute for House Bill #4152 as passed by the Senate on May 18, 2011.

4. Substitute for House Bill #4152 as passed by the Senate on May 18, 2011, and as passed by the House on May 18, 2011.

The legislation introduced on January 26, 2011 as House Bill #4152 was a bill to amend PERA to add a section 7b. As originally introduced, the bill read as follows:

> Except as otherwise indicated in this Act, a public employer shall continue wages and benefits at the same level in effect at the end of the expired contract during

> active negotiation or mediation of a new contract and shall not provide step increases during that time. Any increase in the cost of maintaining health benefits at the level in a former contract shall be borne by the employee. The wages and benefits under a new contract may be made retroactive to the expiration date of the former contract. This section does not limit the ability of the Commission to require an increase in wages or benefits if it finds that the public employer has refused to meet at reasonable times or confer in good faith with respect to wages, hours and other terms and conditions of employment.

A substitute for the bill passed by the House on March 10, 2011 amended PERA to add a Section 15b. The first paragraph of House Bill #4152, as passed by the House on that date, read:

> Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits.

Other paragraphs were added to this section, including a paragraph prohibiting parties from agreeing to "retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration date of the collective bargaining agreement." However, Act 54, as adopted by the Legislature and signed by the Governor, included the first paragraph of the bill as passed by the House on March 10, 2011.

In addition to the above, I have also considered, and made part of the record in this case, the following legislative analyses; a legislative analysis prepared by the House Fiscal Agency on March 2, 2011; a committee summary prepared for the Michigan Senate on March 15, 2011; and a bill analysis done by the Department of Licensing and Regulatory Affairs on May 26, 2011.

Discussion and Conclusions of Law:

Under Section 15 of PERA, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Neither party may take unilateral action on a mandatory subject of bargaining prior to reaching impasse. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53 (1974); *Ottawa Co v Jaklinski*, 423 Mich 1, 12-13 (1985). At contract expiration, "wages, hours, and other terms and conditions of employment" established by the contract survive the contract by operation of law during the bargaining process. A public employer, therefore, has the continuing obligation during the bargaining process to apply those "wages, hours, and other terms and conditions of employment"

designated as mandatory subjects until such time as impasse is reached in the bargaining process. *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage,* 134 Mich App 466, 472 (1984).

The specific issue presented in *Portage* was whether a public employer could lawfully discontinue making the cost-of-living salary adjustments (COLA) provided for in an expired collective bargaining agreement even though the parties had not reached impasse in negotiations for a successor agreement. In *City of Portage*, 1981 MERC Lab Op 952, a majority of the Commission held that the employer did not have an obligation to continue making COLA after the contract expired. It reasoned that, in the absence of specific contract language indicating the parties' intent to have the COLA continue, the employer's only obligation during bargaining was to continue paying wages at the rates as they existed when the contract expired. The Court of Appeals disagreed. It found that a policy or practice of making periodic adjustments to the wages of the employees had been established as per the schedule/formula set forth in the COLA provision in the expired contract. That policy or practice, the Court held, had become an existing term of employment which survived the expiration of the contract like any term or condition. It concluded that the employer could not unilaterally terminate such a practice before reaching a bargaining impasse any more than it could unilaterally reduce wage rates, and therefore was required to continue making COLA payments until the parties reached agreement or impasse on a new contract. The Court subsequently relied on *Portage* to reach the same conclusion in another case involving COLA, *Wayne Co Government Bar Ass'n v Wayne Co,* 169 Mich App 480 (1988).

A month before the Court of Appeals decision in *City of Portage*, the Commission adopted the Court's reasoning in that case and applied it to salary adjustments made automatically pursuant to a salary grid. 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 of service (or the completion of educational requirements) is itself a condition of employment that cannot be changed without bargaining." The Commission concluded that "the wage structure is as much a condition of employment as the wage level set by contract."

In *MESPA v Jackson Cmty College,* 187 Mich App 708 (1992), aff'g 1989 MERC Lab Op 913, the Court of Appeals affirmed the Commission's decision that an employer had the obligation, after the contract expired, to continue paying annual step increases in accord with the salary grid in the expired contract. The Court held, at 713, that there was "no meaningful distinction between PERA's application to COLA provisions and step increases; both relate directly to wages and are capable of definite computation." The Court in *Jackson* cited with approval the Commission's holding in *Detroit Pub Sch Dist (Bus Drivers and Site Management Unit.*

In *Sandusky Cmty Schs*, 22 MPER 90 (2009), a decision issued by me which was adopted by the Commission after no exceptions were filed, a charge was filed alleging that a school district violated its duty to bargain by refusing to pay step increases. As in the instant case, the parties' had an expired contract which contained a salary grid pursuant to which unit members received both salary adjustments based on increased experience and salary adjustments based on

increased educational attainment. The employer's position at the bargaining table was that wages should be frozen for the term of the contract and no salary adjustments paid for either experience or educational attainment. This continued to be the employer's position when the school year began and, according to the union, adjustments for increased experience and educational attainment were due. The employer refused to make any adjustment to employees' salaries. After reviewing the cases discussed above, I found that it was "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." I concluded that the employer in that case violated its duty to bargain by refusing to pay these adjustments because the parties had not reached impasse.

This was the state of the law when the Legislature enacted Act 54 on June 8, 2011. As Charging Party correctly notes in its reply brief, the Legislature is presumed to legislate with knowledge of and regard to existing laws upon the same subject. *Nummer v Treasury Dept,* 448 Mich 534, 554, n 23(1995); *Lenawee Co. Gas & Electric Co v City of Adrian,* 209 Mich. 52 (1920). In this case, it is also clear from the legislative analyses that the Legislature did know and understand the state of the law with respect to an employer's obligation to pay step increases after the expiration of a contract. These analyses, and the structure of the law, clearly establish that it was the Legislature's intent in Act 54 to alter the duty to bargain under PERA as it had been interpreted by the Commission and the Courts by eliminating a public employer's duty to make automatic salary adjustments based on increased experience between contract expiration and the effective date of a successor contract. Since in Michigan a public employer's duty to bargain is purely a creature of statute, the Legislature had the authority to limit that duty. *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). The question here whether the Legislature also intended to limit the duty to bargain by eliminating the employer's obligation to make salary adjustments based on increased educational attainment, or what the parties here refer to as "lane changes," or "rail increases."

Charging Party argues that if it had been the Legislature's intent to eliminate the obligation to make lane changes, it would have said so in the statute. As it notes, a cardinal rule of statutory interpretation is that where a statute is plain and unambiguous, there is no room for administrative or judicial construction. *Stover v Retirement Bd,* 78 Mich App 409 (1977). Charging Party points out that the second sentence of §15b reads, "The prohibition in this subsection includes increases that would result from *wage step increases*." [Emphasis added] Charging Party cites a number of Commission cases, including *Sandusky* and *Ida Pub Schs,* 1996 MERC Lab Op 211, in which the Commission used the term "step increase" to refer to automatic salary adjustments based on increased experience, as distinct from lane or rail increases based on increased educational attainment. Charging Party argues that the Legislature should be presumed to have understood the difference between a step increase and a lane change. According to Charging Party, under the doctrine of expressio unius est exclusio alterius ("everything not expressly prohibited is allowed'), the second sentence of §15b clearly and unambiguously excludes lane changes because it mentions only step increases.

The most obvious problem with this argument is that, as Respondent points out, Charging Party's interpretation ignores the more generalized prohibition contained in the first sentence of §15b which states, "…a public employer shall pay and provide wages and benefits at levels and

amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement." As Respondent points out, lane changes appear to fit squarely within this prohibition; if Respondent had made these salary adjustments at the beginning of the 2011-2012 school year, it would have been providing "wages" to those teachers in amounts greater than those in effect when the contract expired on June 30, 2011. According to Respondent, by limiting the prohibition to "wage step increases," Charging Party has effectively read the first sentence out of the statute.

Respondent maintains that the cannon of statutory construction known as ejusdem generis provides guidance here. That rule provides that where specific words follow general ones in a statute, the application of the general term is restricted to things that are similar to those specifically enumerated. *Belanger v Warren Con. School Dist*. 432 Mich 575, 583 (1989). That is, the particular words are treated as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. *Huggett v Department of Natural Resources*, 464 Mich 711, 718, (2001). In this case, according to Respondent, the specific term "wage step increases" in the second sentence indicates the class, and the more general term preceding it in the first sentence, "wages," extends to things within that class. It argues that both the Commission and the Courts have regarded that component of an expired wage grid which provides for increased compensation based on educational attainment as being of the same nature as a "wage step increase" based on additional experience. Therefore, rather than limiting the prohibition in the first sentence, the second sentence of §15b expands it to include all things, including lane changes, within that class.

I agree with Respondent that the prohibition in §15b is broader than "wage step increases," even if this term is interpreted to mean only automatic salary adjustments based on increased experience. I note that ALJ O'Connor, in his June 6, 2012 Decision and Recommended Order in *Bedford Pub Schs*, agreed that the language in the first sentence of §15b requiring the maintenance of wages and benefits at pre-existing levels and amounts should be construed as prohibiting other types of automatic across-the-board salary adjustments, such as COLA. As he explained it, the second sentence states that the prohibition "includes" increases that would result from wage step increases, which he takes to mean that it also includes something else. On this point, ALJ O'Connor and I agree. We also agree that the Legislature did not intend in §15b to prohibit a public employer from promoting employees to new positions and giving them wage increases based on increased job duties or responsibilities.

Charging Party argues here that other statutes recently enacted by the Legislature demonstrate the Legislature's support for and encouragement of further training for teachers. It cites an amendment to the School Code, MCL 380.1250, effective January 4, 2010, requiring school districts to implement and maintain a method of compensation that includes job performance and job accomplishments as a significant factor in determining compensation. It notes that in 2011, the Legislature also amended the School Code, in MCL 380.1249(2)(a)(ii), to require a school district to consider a teacher's training as one of the factors used to evaluate him or her, and, in MCL 280.1249(5)(b)(i), to require a school district to provide individualized development plans including training for teachers rated ineffective or minimally effective. Charging Party argues that, given the priority placed by the Legislature on teachers' bettering their skills, it makes no sense to assume that the Legislature intended to penalize teachers for

obtaining additional training by withholding their lane change increases. I agree with Respondent that the statutes cited do not demonstrate any particular interest by the Legislature in encouraging teachers to acquire more academic credentials, as opposed to other types of training. More important, the statutes cited and Act 54 clearly deal with different subjects. There is, therefore, no need to harmonize them. See *Manistique Area Schs,* 18 Mich App 519, 524, (1969).

In *Bedford,* however, ALJ O'Connor drew a distinction between salary adjustments based on increased educational attainment, on one hand, and what he referred to as "across-the-board" wage increases, including COLA and wage increases based on increased experience. He concluded that denying the former would not effectuate the purposes of Act 54. According to legislative analyses, one of the purposes of Act 54 was to relieve financially-stressed public employers from the substantial burden of paying automatically mandated wage increases and increases in employee benefit costs after their contract' expired. Another purpose was to reduce the unions' incentive to delay agreement on a new contract when employers were proposing reductions in wages and/or benefits as part of the new agreement.

I do not believe that the Legislature intended a distinction in Act 54 between wage increases based on educational attainment and other types of wage increases for the same work. Salary adjustments given for increased educational attainment recognize that, for some jobs and professions, increased education generally leads to better job performance and more value for the employer. However, salary adjustments given for increased experience recognize the fact that job performance also generally improves with increased experience, at least for employees in the early stages of their careers. It is true that employees have to take the initiative to obtain additional educational credentials, and may have to expend time and money doing so. The salary adjustment, therefore, also serves as an incentive for them to obtain these credentials. However, salary adjustments based on increased experience provide an incentive for employees to remain with the employer rather than leaving for a better paying position after they have acquired some on-the-job training. Moreover, both traditional step increases and lane changes are, like COLA, automatic in the sense that the employer has no discretion to grant or deny these increases on an individual basis. Prior to Act 54, once the employer agreed to them, they became part of the existing wage structure which the employer was obligated to maintain during negotiations for a new agreement.

ALJ O'Connor concluded in *Bedford* that there was no rational relationship between the purposes of Act 54 and prohibiting wage increases based on educational attainment. This conclusion was based in part on a finding that requiring employers to pay this type of increase would have less financial impact than requiring them to pay wage increases based on increased experience. He also concluded that because wage increases based on educational attainment would necessarily affect a smaller percentage of the workforce, requiring an employer to pay these increases would not reduce a union's incentive to settle its contract in the same way as requiring the employer to pay other types of increases. The parties in this case did not provide me with information about how unit members were distributed on the salary schedule. However, it seems evident that, under a salary schedule similar to the one in this case, an employer might in some year have to pay more for lane change increases than for step increases based on increased experience. It also seems evident that requiring an employer to grant any type of wage

increase at a time when the employer is demanding that the union agree to wage reductions would reduce the union's incentive to reach agreement.

Lane changes, like salary adjustments for increased experience and COLA, are wage increases that, for unionized employees, result from collective bargaining. Like salary adjustments for increased experience and COLA, an employer's obligation to pay a lane change increase is automatically triggered by the fulfillment of a condition. In the case of a wage step increase, the condition is generally an employee's attainment of an additional year of experience. For COLA, it is an agreed-to change in a consumer price index. In the case of a lane change, the condition is the employee's attainment of additional educational credentials. Under the rationale established by the *Portage* case, an employer's policy or practice of paying these types of wage increases becomes an established term and condition of employment that, until PERA was amended by Act 54, the employer was obligated to maintain after its collective bargaining agreement expired. Nothing in Act 54 persuades me that the Legislature intended to exclude lane changes from the requirement in the first sentence of that statute that employers pay wages at amounts and levels no greater than those in effect at the expiration of the contract.

Charging Party also argues in this case that interpreting Act 54 to prohibit lane changes after the expiration of a collective bargaining agreement would make that Act unconstitutional. According to Charging Party, this interpretation would, without due process, deprive unionized teachers of property rights they accrued under the collective bargaining agreement and relied upon, to their detriment, in expending their own time and funds to acquire additional education on the promise of receiving additional compensation for that education. I agree with Respondent that this constitutional argument is not properly before the Commission, and I do not address it.

In accord with the findings of fact and discussion and conclusions of law above, I find that Respondent had no obligation under PERA to adjust the salary of members of Charging Party's bargaining unit at the beginning of the 2011-2012 school year to reflect their additional educational credentials. 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: _____