STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BEDFORD PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C11 L-211
-and- Docket No. 11-0642

BEDFORD EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Collins & Blaha, P.C., by Gary J. Collins and John C. Kava, for Respondent

White, Schneider, Young, & Chiodini, P.C., by Michael M. Shoudy, for Charging Party

Brad Banasik and Eric Griggs, for Amicus Curiae Michigan Association of School Boards, on exceptions

DECISION AND ORDER

On June 6, 2012, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Motion for Summary Disposition in the above matter finding that Respondent, Bedford Public Schools, breached its duty to bargain in violation of § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e) by unilaterally altering existing terms and conditions of employment. Between the date the collective bargaining agreement between Respondent and Charging Party, Bedford Education Association MEA/NEA, expired and the effective date of a successor agreement, Respondent failed to pay wage adjustments that the contract provided for individual teachers who attained specified educational advancement. 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 § 15b of PERA did not prohibit the payment of wage increases based on enhanced educational credentials following the expiration of a collective bargaining agreement.

The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA. Respondent filed exceptions to the ALJ's Decision and Recommended Order on July 2, 2012. On July 20, 2012, Respondent filed a Notice of Supplemental Authority and Oral Argument Request. On August 13, 2012, Charging Party filed its brief in support of the ALJ's Decision and Recommended Order. On October 4, 2012, by leave of the Commission, an amicus curiae brief was filed on behalf of the Michigan Association of School Boards.

In its exceptions, Respondent contends that the ALJ erred by determining that there was no ambiguity in the language of Act 54, and then proceeding to engage in analysis of legislative intent and statutory construction, an examination which is normally reserved for resolving ambiguity. Further, Respondent asserts that the ALJ misconstrued the legislative intent behind Act 54 and contends that it was intended to freeze all wage increases in place at the expiration of the collective bargaining agreement until a successor agreement is in place. In its brief in support of the ALJ's decision, Charging Party asserts that the ALJ correctly interpreted Act 54 and properly concluded that the statute clearly and unambiguously does not prohibit wage increases provided due to educational advancement. Additionally, Charging Party asserts that the ALJ properly interpreted the legislative intent behind Act 54, and that recent legislative amendments make it clear that the Legislature wants to encourage teachers to further their education.

In its amicus curiae brief, the Michigan Association of School Boards supports Respondent's contention that the ALJ's decision should be reversed. It argues that § 15b of PERA must be interpreted to prohibit wage and benefit increases beyond increases that result from step progressions based on years of service to accomplish the Legislatures' intent in adopting Act 54.

We have considered the arguments made in Respondent's exceptions and in the amicus curiae brief and find them to have merit.

Procedural Issues

More than two weeks after filing timely exceptions on July 2, 2012, Respondent filed its Notice of Supplemental Authority and Oral Argument Request. In the Notice of Supplemental Authority, Respondent seeks to have us consider the decision by ALJ Julia C. Stern in *Waverly Cmty Sch -and- Ingham Co Ed Assn/Waverly Ed Assn*, Case No. C11 K-206. We have reviewed ALJ Stern's Decision and Recommended Order in *Waverly Cmty Sch* on exceptions and our decision in that case is being issued concurrently with this decision.

After reviewing the exceptions, the response to the exceptions, and the amicus curiae brief, 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 Bedford Education Association, MEA/NEA, represents a bargaining unit of teachers and certain other professional personnel employed by Respondent, Bedford Public Schools. Charging Party and Respondent are parties to a collective-bargaining agreement that expired June 30, 2010. That agreement provided that bargaining unit members would receive salary adjustments based on increases in their level of educational achievement (which the parties refer to as "lane changes") and years of experience. According to the charge:

> Article 22 (professional compensation) and Appendix A of the parties' most recent collective bargaining agreement provides that the Association's members shall receive salary adjustments based on their level of education. There are horizontal lane changes in Appendix A for members with the degree level of BA, BA+15, BA+36/MA, MA+15, and MA+36/Spec.

In the beginning of the 2011-2012 academic year, Respondent paid increased wages to bargaining unit members whose educational achievement moved them to higher "lanes" on the salary grid. However on October 14, 2011, Respondent sent notice to Charging Party that § 15b of PERA requires wages to be frozen at the point the contract expired and until a successor agreement is reached. Subsequently, Respondent began deducting from bargaining unit members' wages to recover the previously paid wage increases that were based on educational achievement.

Charging Party filed the unfair labor practice charge in this matter on December 8, 2011. Subsequently, the parties each moved for summary disposition on the issue of whether the prohibition against paying wage increases between contract expiration and the commencement of a successor agreement applies to wage increases based on educational achievement. Wage increases based on educational achievement are sometimes referred to as "lane changes" or "rail increases."

Discussion and Conclusions of Law:

Section 15 of PERA requires public employers to bargain in good faith with the labor organizations representing their employees with respect to mandatory subjects of bargaining. A mandatory subject of bargaining is one that has a significant or material impact on wages, hours, and other terms and conditions of employment or settles an aspect of the employer-employee relationship. *Detroit v Michigan Council 25, AFSCME,* 118 Mich App 211, 215;

324 NW2d 578, 580 (1982). Once a subject has been determined to be a mandatory subject of bargaining, the parties must bargain concerning the subject and neither party may take unilateral action on that subject unless the parties arrive at an impasse in their negotiations or there is a clear and unmistakable waiver. *Wayne Co Gov't Bar Ass'n v Wayne Co,* 169 Mich App 480, 486; 426 NW2d 750 (1988); 1 MPER 19105, aff'g 1987 MERC Lab Op 230; *Central Michigan Univ Faculty Ass'n v Central Michigan Univ,* 404 Mich 268, 277 (1978). See also *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 54-55; 214 NW2d 803 (1974).

Prior to the effective date of Act 54, it was well-settled that after contract expiration, a public employer had a duty to continue 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), lv den 422 Mich 924 (1985). See also *Wayne Co Gov't Bar Ass'n,* at 485-486; *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 survived the contract by operation of law during the bargaining process unless there was a clear and unmistakable waiver. *City of Portage*. Among the numerous mandatory subjects of bargaining that have been determined to survive contract expiration are: periodic cost of living salary adjustments, *Wayne Co Gov't Bar Ass'n; City of Portage*; *Gibraltar Sch Dist*, 1993 MERC Lab Op 510; wage increases due to increased experience, *MESPA v Jackson Cmty College,* 187 Mich App 708 (1992), aff'g 1989 MERC Lab Op 913; *Detroit Pub Sch, (Bus Drivers & Site Mgmt Units)*, 1984 MERC Lab Op 579, 581; *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 202; *Jackson Cmty Coll*, 1989 MERC Lab Op 913, 915-16, aff'd 187 Mich App 708 (1991); *Wayne Co*, 1987 MERC Lab Op 230, 233-34, aff'd 169 Mich App 480 (1988); and wage increases due to educational achievement (sometimes known as lane changes or rail increases), *Jackson Cmty Coll*, at 915-16; *Detroit Pub Sch, (Bus Drivers & Site Mgmt Units)*; *Sandusky Cmty Sch*, 22 MPER 90 (2009) (no exceptions).

With the enactment of Act 54 it is clear that some mandatory subjects of bargaining no longer survive contract expiration. 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 ALJ has interpreted this language to apply to wage increases based on increased years of experience but not to wage increases based on educational achievement, reasoning that the former occur automatically with the passage of time whereas the latter only occur after the employee has expended the time and resources necessary to obtain educational advancement. The ALJ opined that Act 54 prohibits automatic across-the-board increases, but does not expressly prohibit promotional increases. He goes on to explain that the language expressly including step increases in the prohibition against wage increases is to clarify that step increases, though provided by the salary grid in the existing contract, are not within existing "levels and amounts." The ALJ further notes that Act 54 does not expressly prohibit lane changes, which he describes as "an incentive and reward for individual employees to secure advanced degrees, typically on their own time and largely, if not entirely at their own expense." The ALJ views the Legislature's goal in enacting Act 54 as increasing the incentive for labor organizations to settle collective bargaining agreements. He reasons that the legislative goal is advanced by denying across-the-board increases, such as step increases, that would go to the entire bargaining unit because doing so puts economic pressure on the entire workforce. However, the ALJ concludes that denying promotional or educational achievement wage increases is not rationally related to the goal of achieving timely contract settlements because those increases affect a much smaller percentage of the workforce.

Respondent contends that the ALJ erred by determining that there is no ambiguity in the language of Act 54, and then proceeding to engage in analysis of legislative intent and statutory construction, an examination which is normally reserved for resolving ambiguity. Further, Respondent asserts that the ALJ misconstrued the legislative intent behind Act 54 and contends that it was intended to freeze all wage increases in place at the expiration of the collective bargaining agreement until a successor agreement is in place.

In reviewing the ALJ's decision in this case and the decision by ALJ Stern in *Waverly Cmty Sch -and- Ingham Co Ed Assn/Waverly Ed Assn*, Case No. C11 K-206, our task is to determine and give effect to the intent of the Legislature in adopting Act 54. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281, 289 (2011); *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). To do so, we must first review the statute's wording, which provides the most reliable evidence of the Act's intent. *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). Where the language of the

statute is clear and unambiguous, we must apply the wording of the statute and not rely on legislative history or other means of statutory interpretation to determine the legislative intent. *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).

We agree with the ALJ that there is no ambiguity in the language of Act 54, at least with respect to the issue before us. The ALJ noted that while the Legislature defined certain terms used in Act 54, it did not define the phrase "levels and amounts." As he pointed out, the Legislature clarified its intent by expressly stating that the prohibition against post-contract-expiration wage increases includes step increases. The ALJ went on to consider whether that clarification was sufficient to include in the prohibition against post-contract-expiration wage increases those increases based on educational achievement, which are sometimes referred to as "lane changes" or "rail increases." He then proceeded to analyze the legislative intent and statutory construction to determine that lane changes or rail increases are not included within the term "wage step increases."

While the Legislature did not define the phrase "levels and amounts," we may rely on the definition of those terms found in a standard dictionary. *Halloran v Bhan*, 470 Mich 572, 578-579; 683 NW2d 129, 132 (2004); *Shelby Twp v Dep't of Soc Serv*, 143 Mich App 294, 300 (1985). "Level" is defined as "relative position or rank on a scale; a relative degree, as of achievement, intensity, or concentration."[1] "Amount" is defined as "a number; a sum."[2] Therefore, in stating, "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," Act 54 limits the wages payable by a public employer after contract expiration to the amounts being paid at the applicable levels of the salary grid on the date the contract expired. If we look just at the first sentence of Act 54, we might interpret it to mean that the amounts payable for wages are those amounts set forth in the collective bargaining agreement, including all those specified in a salary grid. However, the Legislature went on to provide: "The prohibition in this subsection includes increases that would result from wage step increases." The addition of that language makes it clear that wage step increases that were not due as of the date of contract expiration are not to be paid prior to the effective date of a successor collective bargaining agreement.

In its brief in support of the ALJ's Decision and Recommended Order, 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

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[1] See *The American Heritage College Dictionary, Third Ed.*, (2000).
[2] See *The American Heritage College Dictionary, Third Ed.*, (2000).

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. As in cases involving cost of living adjustment provisions, the key factor in these cases 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. Since this agency has treated lane changes or rail increases as a type of step increase, we cannot assume that the Legislature would do otherwise. Accordingly, we find that Act 54 prohibits the payment of 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.

Respondent contends that the ALJ erred when he held: "Denying individualized promotional or educational attainment increases is not rationally related to that goal of pushing timely contract negotiations because it necessarily affects a smaller percentage of the workforce." Respondent asserts that in this case, two hundred of the bargaining unit members are eligible for a wage increase based on educational achievement whereas only ninety-three are eligible for an increase based on years of service. 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 is not relevant to determining legislative intent.

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 hereby reversed. Respondent, Bedford Public Schools, did not breach its duty to bargain under § 10(1)(e) of PERA when, after the enactment of Act 54, it failed to pay wage adjustments that the expired contract provided for individual teachers who attained specified educational advancement. Respondent's decision to refrain from paying those wage adjustments was in compliance with § 423.215b of PERA.

ORDER

The charges in this case are 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:

BEDFORD PUBLIC SCHOOLS,
Employer-Respondent,

-and- Case No. C11 L-211
Docket 11-000642

BEDFORD EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
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APPEARANCES:

Michael M. Shoudy, for Labor Organization-Charging Party

John C. Kava, for Respondent-Public Employer

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, MCL 423.201, *et seq*, as amended, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based upon the entire record:

The Unfair Labor Practice Charge:

On December 8, 2011, a Charge was filed in this matter by the Bedford Education Association, MEA/NEA (the Union or Charging Party) against the Bedford Public Schools (Employer or Respondent). The Charge alleged that the Employer had violated its bargaining duties by failing to provide salary increases, as set forth in an expired collective bargaining agreement, to individual teachers who attained a specified educational advancement, such as receiving a master's degree. The Employer acknowledged the pre-existing duty to pay such increases, but asserted that to do so would violate the newly created prohibition

on post-contract expiration wage increases established by MCL 423.215b in 2011.[3]

The Union filed a motion for summary disposition on April 11, 2012, with the Employer's response and cross-motion for summary disposition filed on May 5, 2012. Both parties asserted that there were no material disputes of fact and each sought summary disposition premised on their differing views of the obligations under PERA and, in particular, as affected by the new provisions of MCL 423.125b, established by 2011 PA 54.

Findings of Fact and Discussion and Conclusions of Law:

Counsel for the parties appeared for oral argument on cross-motions for summary disposition on May 18, 2012. Preliminary to the argument, I stated on the record my understanding of the undisputed facts, as set forth below:[4]

JUDGE O'CONNOR:

> The Union brought a motion for partial summary disposition. The Employer brought a cross motion and both are really limited to a portion of the claims in Case C11 L-211 which is Docket Number 11-000642. That charge asserted that the Employer acted improperly in failing to pay salary increases based on the then-expired contract which provided for increases when a teacher reached a new educational attainment level, like going from a bachelor's degree to a master's degree. Those [salary increases] are referred to by the parties as "lane changes".
>
> The Employer's defense is essentially premised on its reading of 2011 PA 54 which amended PERA at Section 423.15b. [The] Employer's position is the types of increases [in dispute here] would be prohibited following the contract expiration.
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> It is clear, and both parties recognize, that the Legislature through the amendment intended to prohibit wage creep after contract expiration and barred ordinary COLA or automatic step increases.

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[3] This matter was preliminarily consolidated with related charges filed by the Union in Case # C11 I-146 Docket 11-000864 and by the Employer in Case # CU12 A-004 Docket 12-000088. The mutual assertions of bargaining violations raised in those cases are severed and reserved for a trial now scheduled for August 1, 2 and 8, 2012. This Decision and Recommended Order is a final order on this Charge, subject to the filing of exceptions.

[4] The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

The question today is whether the reach of that amendment also bans what the parties call lane changes, which are premised on a change in an individual employee's circumstances, rather than an across-the-board increase. They are different types of increases and the question is going to be: How closely related are they?

Neither side has raised any disputed facts necessary to the resolution of the portion of the underlying dispute which is addressed in the cross motions, so the question does appear to be one of applying the statutory language to the dispute, and summary disposition appears likely appropriate. Sometimes, in the middle of argument on summary disposition, that changes. Somebody comes up with a fact or a dispute, but right now it looks likely that this is ripe.

I understand from the charge that there are about seven teachers who sought [and were otherwise entitled to] these increases and did not get them [out of a unit of approximately two hundred and fifty teachers].

The amendment requires that after a collective bargaining agreement expires, an employer must -- and this is a quote -- "*pay wages at levels and amounts that are no greater than those in effect when the collective bargaining agreement expired*." It goes on to provide that that mandate, or that prohibition really, on any increases includes increases that would result from "*wage step increases*". Step increases are those that, typically at least, are automatic increases based on years of service. We see them sometimes called annual service adjustments and various other things, but the typical step increase is one that everybody gets every year, or perhaps every two years, on a calendar basis rather than because that employee has done something differently.

Again, typically you reach the next benchmark in time and you are automatically placed at the next higher step on the pay scale. We also see contracts where there are contingencies built in, i.e., you only get the step increase if you got a satisfactory evaluation, but still the basic concept is it's an automatic increase.

Lane changes, on the other hand, are individualized. If a particular teacher achieves the goal of getting their master's degree, for example, they jump to a different level on the pay grid. Lane changes are not across-the-board increases or based on passage of time. They're based on individual accomplishment.

The parties have briefed and may still argue a question today, but I will tell you that it appears obvious to me that the Legislature intended its prohibition on otherwise automatic pay increases to be broader than just step increases. The second sentence of the amendment says that the

mandate "*includes*" increases that would result from wage step increases. I take that to mean that it includes something else. The second sentence provides expressly that the prohibition during any interregnum includes step increases and that seemingly presumes the inclusion of other types of increases -- some other types. What you've got to persuade me of is what else is included or not included.

Both parties have briefed the issue of whether a change as broad as that asserted here would be unconstitutional. That question, while interesting, is beyond my pay grade. You've preserved the issue, [and] probably shouldn't spend much time arguing it. I don't see that I have authority to rule on whether it's constitutional or not constitutional.

Likewise, the Union raises what is essentially a detrimental reliance claim, because the teachers were promised increases [if they achieved advanced degrees], [and] went and got their degrees, then were not given the increases. That's really more akin to a contractual claim which also is not before me. It may be valid. It may not be valid. It is just not my job [to resolve].

Similarly, I am aware there is a pending court challenge over the assertion that the immediate effect given to various statutes and amendments was done so improperly. That is not before me. It could have an impact on this case because the denial of the disputed increases here occurred shortly after the statute was given immediate effect and I'm noting that for the record because it may be an issue if the courts take a position one way or another on the immediate effect question. So you could end up back here because of a change by the court on that question, but it's not something that I would have authority to look at.

School districts and unions all over the state are faced with compliance with this statute and are struggling to comport themselves with the law. It appears that many districts and unions are having trouble coming to a resolution as to what conduct is prohibited or not prohibited by this statute.

Again, it is apparent the Legislature sought to block automatic increases. It is far less clear to me whether they also intended to block all individualized increases. The language chosen by the Legislature was that the Employer must pay no more than existing "*levels and amounts*". The amendment did not clarify expressly whether that meant an individual employee's *"levels and amounts"* or it meant group *"levels and amounts"*. Here, of course, we have several individuals seeking to move into a pre-existing level or amount that was paid within the group and that was being received presumably by others who had reached the same educational attainment.

Counsel for the parties concurred that there were no material facts in dispute and provided extensive legal argument. After considering the pleadings and arguments of both parties, I concluded, as conceded by both parties, that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165. See also *Detroit Public Schools,* 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc,* 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, with the substantive portion of my findings of fact and conclusions of law from my bench opinion set forth below:

JUDGE O'CONNOR:

> I will note that the parties are scheduled to be back [for trial] in mid-June on multiple related charges. And I understand from counsel that the parties just recently received a fact finder's report, which is part of the bargaining process, and are scheduled for bargaining sessions in the immediate future and between now and the next hearing date.
>
> Taking that into account and taking into account the mandate of PERA, which instructs that the parties are most likely to resolve their disputes with the guidance of a governmental agency with specialized expertise in labor relations, I [will] issue a bench opinion because I think it would aid the parties to at least have the Agency's recommended decision and order on this issue as you go back into bargaining. Obviously, having this issue unresolved is a likely impediment to productive bargaining. Having it resolved or at least preliminarily resolved, since everything is subject to appeal, may aid the parties.
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> * * * *
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> I want to thank Counsel for a very effective argument. This is not an easy question. This is not a simple question. I am prepared to issue a bench opinion.
>
> The Public Employment Relations Act is a remedial statute. We are instructed by the case law that it should be construed broadly, including in particular regarding the extent of the duty to bargain, with the courts expressly noting the prohibition on public employee strikes as compared to private sector labor law as a reason for broad construction of PERA.[5]

[5] See, *Bay City Ed Ass'n v Bay City Public Schools*, 430 Mich 370, 375 (1988).

Given the mandate to broadly construe PERA, a restrictive amendment seemingly should rationally be narrowly construed and enforced in keeping with its plain language.

The plain language of the amendment requires the maintenance of wages at pre-existing "levels and amounts". It clearly prohibits payment of automatic step increases. That's plain. That's easy and it doesn't answer the question before us.

I think that express mandate and the structure of the statute must be construed to prohibit comparable automatic across-the-board increases, such as COLA [cost of living] escalators. The amendment does not obviously or expressly include promotional increases such as [for a] teacher [promoted] to department head. Denying such promotional increases would be counterintuitive and would contradict the seeming legislative purpose, at least as revealed in the House Legislative Analysis [of March 3, 2011], and to the extent that it does, the Senate Fiscal Agency Analysis [of March 15, 2011] as well, as well as the structure of the amendment itself, which clearly was not intended to foreclose all pay increases if made pursuant to a comprehensive collective bargaining agreement to which both parties agreed.

The goal from the structure of the statutory amendment and from the House Legislative Analysis in particular -- and the Senate as well, appears to be to avoid all automatic increases with the rationale offered in the Legislative analyses that such automatic increases were seen as deterring rather than encouraging timely resolution of expired collective bargaining agreements.

As counsel are aware, I've struggled with the question of what did the Legislature mean by “levels and amounts”? They didn't do us the favor of defining it. The Legislature is not obliged to define every term. The parties have to try to figure out what the Legislature meant. Failing at that, Administrative Law Judges and other judges have to decide what they believe the Legislature meant.

I looked repeatedly at the structure of the amendment. In Section 15(b)(1), the first sentence prohibits increases above existing levels and amounts of wages and benefits pending negotiation of a collective bargaining agreement. The second sentence fine tunes that regarding wages. The third sentence fine tunes it regarding insurance. And it seems to be a fairly rational structure for the paragraph.

The fourth sentence, which isn't relevant to our dispute here today, again shows the rational progression of the Legislature in saying that the

employer can make payroll deductions to finance the above sentences as necessary.

So trying to parse the Legislature's intent with the first sentence referring to maintenance of existing levels and amounts, the second sentence refines that and provides that the prohibition in this subsection includes increases that would result from wage step increases. The Union argues that must mean something because otherwise, it's just surplus language. The preceding sentence says maintain existing wages at levels and amounts. The second one says no step increases in wages, so it has to mean something.

And I'm not finding that the language is ambiguous. I think it was problematic, the use of the phrase “levels and amounts” because none of us really had a ready explanation for what the Legislature meant, but I think reading the two sentences in conjunction, and notwithstanding that I've referenced the Legislative analyses, I think does provide clarity presuming a focus on the sort of ordinary [claims] made in labor relations, which I think the House Legislative Analysis does presume and does instruct.

The first sentence requires that payments be maintained at existing “levels and amounts”. I think that the refinement of the second sentence is rationally related to that and to the likely, if not inevitable, claim that step increases would ordinarily be within existing “levels and amounts”. Because step increases are based on a literal salary grid in many collective bargaining agreements, it has an axis and a bottom line and the step increase that employee ‘A’ would receive is already being received by several other employees. [Any demanded step increase would be within] an existing “level and amount”. And the Legislature is saying no, don't make the argument -- or at least don't accept the argument, that a step increase is within existing “levels and amounts”. That is prohibited, too.

And I think that that is what is meant by the prohibition including step increases. That even though a step increase is within an existing level and amount on a salary grid, [the employee] cannot have it and [the employer] cannot give it out, as it is a prohibition on the employer granting it.

Now, where does that get us with this case? I find that the amendment does not obviously or expressly preclude lane changes which are essentially an incentive and reward for individual employees to secure advanced degrees, typically on their own time and largely, if not, entirely at their own expense, with those advanced degrees objectively increasing the value of the teacher in the classroom and in the marketplace.

Denying those increases would not effectuate the purpose of the amendment, at least the apparent purpose of the amendment and the purpose as articulated in the House Legislative Analysis and in the Senate Fiscal Agency [analysis]. Denying promotional-type increases is not expressly prohibited by the plain terms of the amendment. I think the analysis is [also] supported by the pre-amendment Bill Analysis given by the Department of Licensing and Regulatory Affairs (LARA)[May 26, 2011], which focused on the wage freeze aspect of the amendment as a push to get contract negotiations done in a timely fashion.

There is a rational relationship between denying across-the-board wage increases that would go to the entire bargaining unit, which includes step increases because essentially every employee, unless they've reached the maximum, is going to get a step increase each year. There is a rational relationship to timeliness and contract negotiations in denying those increases. It puts economic pressure on the entire workforce. Denying individualized promotional or educational attainment increases is not rationally related to that goal of pushing timely contract negotiations because it necessarily affects a much smaller percentage of the workforce, which is not to say that it doesn't create some pressure, but it doesn't have the same rational relationship.

I further note that the reference and description of both the automatic step increases and individual rail or lane change educational attainment increases in the House Legislative Analysis, to the extent that I should rely on it, which is only if the statute is ambiguous, but the reference to both in the House Legislative Analysis, while only step increases are expressly addressed in the statute, supports a conclusion that the question of rail or lane change increases was not unknown to the Legislature as they drafted the amendment and that the failure to expressly prohibit rail or lane change increases, as was done with step increases, is of significance in interpreting the statute.

I find that Section 15(b) of the Act does not prohibit the payment of individualized educational lane-change-based increases following the expiration of a collective bargaining agreement. And to the extent that the Employer refused to pay such promotional increases where the entitlement was otherwise undisputed, that is where it is clear the teacher got the master's degree or Ph.D. and should have received an increase absent the question of compliance with 15(b), that where the increase was otherwise undisputed, it was an unlawful unilateral change in conditions of employment to fail to pay it and a failure of the obligation to bargain in good faith.

I should note what might be obvious to Counsel, and that is that this finding is not based on a finding that the Employer acted in any

subjective bad faith. It is apparent to me that both parties were honestly struggling to deal with a new statutory amendment which changed the landscape in ways which the parties had to address.

Conclusion:

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge is sustained. The Bedford Public Schools, its officers, agents, and representatives shall:

1. Cease and desist from:

    a. Unilaterally changing conditions of employment during the bargaining process.
    b. Failing to make lane change salary adjustments to those individual teachers accruing entitlement to such changes after June 30, 2011, and prior to the parties fulfilling their respective bargaining obligations.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

    a. Make lane change salary adjustments to those individual teachers accruing entitlement to such changes after June 30, 2011.
    b. Make each employee whole for any lane change salary adjustments which had been improperly withheld after June 30, 2011, together with statutory interest on all late payments.

Based on my findings above, I do not recommend an Order directing the posting of a notice, as I find that such a posting under these circumstances would not effectuate the purposes of the Act.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 6, 2012