**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

MICHIGAN STATE UNIVERSITY,
Public Employer -Respondent,

Case No. C11 H-126

-and-

CAPITOL CITY LODGE #141, FRATERNAL ORDER OF POLICE,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, PC, by Richard W. Fanning, Jr. and Daniel L. Villaire, Jr., for Respondent

Wilson, Lett & Kerbawy, PLC, by Steven T. Lett, for Charging Party

## DECISION AND ORDER

On January 4, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the Charge against Respondent Michigan State University (MSU) did not state a claim upon which relief can be granted under the Public Employment Relations Act (PERA). The ALJ found that Respondent had not violated §10(1)(e) of PERA, 1965 PA 379, as amended, MCL 423.210(1)(e), as alleged in the charge when pursuant to 2011 PA 54, it ceased paying step increases upon expiration of the July 1, 2007 to June 30, 2011 MSU-Fraternal Order of Police main collective bargaining agreement. On this basis, the ALJ recommended that the Commission dismiss the unfair labor practice charge in its entirety. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On January 25, 2013, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On March 13, 2013, Respondent filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Charging Party contends that the ALJ erred in finding that the expiration of the July 1, 2007 collective bargaining agreement prohibited payment of automatic step increases, given that the January 1, 2010 Memorandum of Understanding (MOU) had not yet expired.

Upon review of Charging Party's exceptions, we find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ since this matter is being decided on Summary Disposition and repeat them here only as necessary. We agree with the ALJ that there are no material facts at issue.

Charging Party, the Capitol City Lodge #141, Fraternal Order of Police, represents a bargaining unit of non-supervisory police officers employed by Respondent, Michigan State University. Charging Party and Respondent were parties to a collective-bargaining agreement that expired on June 30, 2011. Article 33 of this agreement, Wages, contained a wage schedule that set forth the base salary for each of the seven steps of the wage scale and provided for salary step adjustments that were linked to an employee's length of service. Under Article 33, an employee automatically moved from a lower to a higher step on the wage scale after each year of employment until the employee reached the top step. Respondent was also party to a Memorandum of Understanding (MOU) with a Coalition of Labor Organizations, including Charging Party that addressed health insurance and provided for across-the-board wage increases. The MOU did not expire until December 31, 2013.

The parties commenced negotiations for the main agreement on June 22, 2011. When the agreement expired on June 30, 2011, they had not reached a successor agreement. Consequently, on July 18, 2011, Respondent notified Charging Party that, in order to comply with Public Act 54 of 2011, it was suspending all step increases until a new collective bargaining agreement was in place. As a result, Charging Party filed the unfair labor practice charge in this matter on August 11, 2011.

Respondent continued to apply the across-the-board wage increases required by the MOU.

Discussions 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 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, such as step increases and cost of living adjustments (COLA), 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*. Prior to the effective date of Act 54, an employer was thus required to continue to provide step rate increases subsequent to a contract's expiration until a new contract was negotiated. As a result, employees received pay increases even though there was no new contract.

Act 54, however, was intended to prevent some mandatory subjects of bargaining from surviving 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.

Act 54, thus, eliminated an employer's duty to make any increase in wage levels or amounts, including step rate increases that previously would have been required by operation of law after the expiration date of a collective bargaining agreement. 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). Pursuant to this authority, in Act 54, the Legislature expressly eliminated a public employer's duty to provide wage step increases after contract expiration. The ALJ, therefore, properly applied the language of that Act to the step-rate increases provided for by Article 33.

Charging Party contends that Act 54 is not applicable because base salary wages for employees are governed by the MOU, a separate agreement that did not expire until December 31, 2013. The Commission disagrees. Although the MOU addressed health care coverage and provided for across-the-board wage adjustments, the MOU did not address step increases. To the contrary, step increases were governed by Article 33 of the collective bargaining agreement that expired on June 30, 2011. Under Article 33 of the expired agreement, an employee automatically moved from a lower to a higher step on the wage scale after each year of employment until the employee reached the top step. Prior to Act 54, the step rate increases due employees under

Article 33 would continue after the contract's expiration by operation of law. Although the MOU sets the salary due an employee at each step, the MOU does not address when or whether an employee advances from one step to another.

In *Waverly Cmty Sch*, 26 MPER 34 (2012), aff'd in *Waverly Cmty Sch v. Ingham Co Ed Assoc/Waverly Ed Assoc*, unpublished opinion of the Court of Appeals, entered August 26, 2014 (Docket No. 314173) the Commission held that the Respondent had no obligation under Act 54 to pay salary increases based upon educational achievement to employees subsequent to the contract's expiration. In so holding, we specifically noted that unconditional wage increases and step rate increases are legally distinguishable:

> 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.

In the present case, as in *Waverly*, step increases took effect only under the conditions set forth in Article 33 of the expired agreement: an employee's attainment of a requisite level of experience measured in years of service. The MOU had no bearing on when an employee would advance from one step to another. The fact that the unexpired MOU provided for across-the-board wage increases, therefore, did not make Act 54 inapplicable, as Charging Party alleges. Consequently, we reject Charging Party's argument and conclude that the ALJ correctly determined that Respondent acted properly when it suspended step rate increases upon contract expiration.

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 affirmed.

## ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission. The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: September 17, 2014

**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

MICHIGAN STATE UNIVERSITY,
Public Employer-Respondent,

-and- CASE NO. C11 H-126
DOCKET 11-000868-MERC

CAPITOL CITY LODGE #141, FRATERNAL ORDER OF POLICE,
Labor Organization-Charging Party.
_____/

APPEARANCES:

STEVEN T. LETT, Wilson, Lett & Kerbawy, PLC, for Charging Party

RICHARD W. FANNING JR., Keller Thoma, PC, for Respondent

**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 August 11, 2011, a Charge was filed in this matter, by the Capitol City Lodge #141 of the Fraternal Order of Police (FOP, Union or Charging Party) asserting that Michigan State University (MSU, the Employer or Respondent) had violated its duty to bargain in good faith under PERA by unilaterally altering certain conditions of employment following the June 30, 2011 expiration of the main collective bargaining agreement between the parties.

The parties had a collective bargaining agreement covering University employed non-supervisory police officers, which ran from July 1, 2007 to June 30, 2011. That contract had a schedule of step increases. There was a separate January 1, 2010 to December 31, 2013 Memorandum of Understanding (MOU) negotiated between the University and a coalition of multiple Unions, which addressed certain health insurance issues and set base wage increases

specific to future years, referencing anticipated successor collective bargaining agreements with each of the several Unions that participated in the Coalition.

Upon expiration of the MSU-FOP main contract, MSU announced its intent to cease paying step increases pursuant to its understanding of the mandates of 2011 PA 54. The Employer also announced its intent to pass through increases in dental insurance (which was covered only by the CBA and not by the MOU), and likewise announced the intent to deny payment of any increase in the cost of the tuition waiver/reimbursement program. The Union filed a charge contesting these three issues; however, the Union later withdrew the dental insurance and tuition dispute from contention in this proceeding.

Counsel for the parties filed cross-motions for summary disposition, with each asserting that there were no material disputes of fact and; therefore, no evidentiary hearing was needed.

Findings of Fact and Discussion and Conclusions of Law:

Counsel for both parties appeared for oral argument on October 16, 2012, regarding the parties' cross motions for summary disposition. After considering the pleadings and extensive arguments by both counsel, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165. 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 opinion, with the substantive portion of my findings of fact and conclusions of law issued from the bench set forth below:[1]

JUDGE O'CONNOR:

> We sometimes issue bench opinions because it is our belief that it helps the parties, particularly parties who are still in the bargaining process and have an unresolved collective bargaining agreement, to know at the earliest possible point what it is we think should happen next, or should have happened, so that you can then maybe finalize your negotiations with the understanding of what we think is necessary.
>
> **FINDINGS OF FACT:**
>
> The parties have a longstanding relationship. FOP and MSU have had a series of collective bargaining agreements. The most recent main collective bargaining agreement expired June 30, 2011.
>
> The parties do not have a current main collective bargaining agreement. The parties also take part in coalition bargaining, which includes most if not all of the several bargaining units at MSU--AFSCME, Operating Engineers, the several police units--all bargaining in coalition with the Employer over a limited range of issues,

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

health insurance and base wage increase issues and a few other things, but it results in a coalition contract that covers all the units, even though each of those constituent unions then negotiates separate main collective bargaining agreements.

There is no dispute about the facts here. The main collective bargaining agreement between the FOP and MSU provided a scheme of step increases. The most recent expired contract had seven steps, and an individual officer would automatically progress through those steps on the anniversary date of their hire.

Separately, the several successive MOUs have provided base wage increases, and as applied by the parties, as I understand the facts, before the expiration of the current FOP/MSU collective bargaining agreement, if a base wage increase was due pursuant to the Memorandum of Understanding, the officer would receive that.

If the officer were not yet at the top step of the FOP pay scale, they would also be entitled [under the FOP-MSU agreement] to a step increase on the anniversary date of their hire. So they might get the 2007 step increase plus the 2007 base salary increase, which then was 1.25%.

That system came apart, as it were, upon expiration of the main collective bargaining agreement on June 30, 2011, leading to this charge.

There were several other issues addressed in the original charge which were voluntarily resolved by the parties, withdrawn by the Union essentially, and I won't address those in this decision. So the only issue is the question of whether subsequent to the expiration of the main collective bargaining agreement step increases should have been paid to officers as they reach their anniversary date.

My understanding from the facts is that as of this past June/July the Employer did, pursuant to the Memorandum of Understanding, provide a 1% lump sum and 1% increase to base as required by the MOU to each officer, but did not pay step increases to any officer who was not at max but who reached their anniversary date.

Those are the facts, and those are undisputed. What is also undisputed is that after the parties negotiated the main collective bargaining agreement, and the MOU as well--the Legislature passed 2011 PA 54, which the parties did not anticipate and could not have anticipated.

The rules changed, and the question is, what impact on these parties did that rule change have?

**CONCLUSIONS OF LAW:**

The Union has charged essentially that the Employer repudiated its obligations under the contract, or alternatively really, unilaterally changed conditions of employment by stopping the step increases during the bargaining process.

The Employer's defense essentially is [that] PA 54 required that they do so. PA 54 requires that after a collective bargaining agreement expires, an employer must--this is a quote:

*"...pay wages at levels and amounts that are no greater than those in effect when the collective bargaining agreement expired*."

PA 54 goes on to provide that that mandate or that prohibition--which is really what it is--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, and that is what we have in dispute here is that portion of the anticipated pay increase that was an automatic increase based on years of service and not a promotion.

You might have a collective bargaining agreement that provided a discretionary progression from Level 5, 4, 3, 2, 1. Those would be promotions.

This collective bargaining agreement provided automatic progression from 5, 4, 3, 2, and 1. Such automatic periodic increases are called various things--annual service adjustments, step increases, or in the case of this contract they are not actually called anything.

There is a grid, and Counsel have clarified how that grid functions, which is fairly typical, and everybody, every year until they reach the max, receives a step increase on a calendar basis, rather than because the employee has done something different.

Here both of the two documents, the main collective bargaining agreement and the Memorandum of Understanding, are collective bargaining agreements and are enforceable as such.

This issue has come before MERC in a number of different formats, different types of disputes, but whether it is a grievance settlement, a Letter of Understanding, a Memorandum of Understanding, whatever the parties might call a document of that sort, if it is negotiated pursuant to the Public Employment Relations Act it is a collective bargaining agreement.

The *Kalamazoo County Sheriff's* case [24 MPER 17 (2011)] involved a similar issue where they had a main collective bargaining agreement with certain dates when it was in effect, when it expired, and a separate Letter of Understanding which kicked in, or at least a portion of it kicked in, after expiration of the main collective bargaining agreement. So you can have multiple documents with differing dates

between the parties, and in this case between the FOP and the University plus other parties, which have different dates. Regardless, they are enforceable as collective bargaining agreements.

As Counsel are aware, the Public Employment Relations Act is a remedial statute. We are instructed by the case law that it should be construed broadly, particularly 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 the broad construction of duties under the Public Employment Relations Act. Part of the duty under PERA is to maintain conditions of employment during the bargaining process. That is part of the process of bargaining in good faith.

Given the mandate to broadly construe PERA, a restrictive amendment, which 2011 PA 54 was, should rationally be narrowly construed and enforced in keeping with its plain language. Here the plain language of PA 54 requires the maintenance of wages at [no more than] pre-existing levels and amounts. It clearly prohibits payment of automatic step increases post-contract expiration.

The dispute here involves step increases payable under the 2007/2011 collective bargaining agreement. Under a long line of MERC case law, the obligation to pay step increases [ordinarily] survives the expiration of the collective bargaining agreement and continues during the bargaining process.

However, PA 54 very specifically altered that pre-existing duty. As I said, the parties could not have anticipated that alteration. It not only threw out the presumption that such step increases continued during the bargaining process post-contract expiration; it prohibited the continuation of such step increases. It did not leave an employer the option of choosing to continue them. . . .

When the Legislature passed PA 54, they were presumably aware of the various arrangements that parties negotiate. The Public Employment Relations Act doesn't determine or even seek to determine what arrangements parties make between themselves [rather], it seeks to provide a process by which those arrangements can be made and a process by which the obligations can be enforced.

Here the parties made arrangements under the laws that existed at the time that the two separate collective bargaining agreements were negotiated. We have seen many parties come before us where the passage of PA 54 altered what the parties may well have anticipated under their collective bargaining agreements, such as where one union might take a wage freeze to keep their health insurance, another might say, "*We'll take lesser health insurance to maintain our wage increases.*"

The Legislature said there is one rule for all, regardless of the prior bargaining history. There are to be no automatic wage increases after contract expiration and during the bargaining process.

If the coalition MOU had covered step increases, the Employer would have been bound to continue paying them because it is an unexpired contract. The Memorandum of Understanding did not cover step increases. It covered increases to base wages, and those are a separate amount of money, a separate item payable to employees covered by the main collective bargaining agreement, and it is undisputed that the Employer has paid the base wage increases anticipated by the MOU.

As I have said, the parties could not have anticipated the legislative shift, but public employee bargaining is a creature of legislation and the rules can be changed and have been changed. Despite any disadvantage perceived by the Union and its members, here the rules on what happens after contract expiration changed. The parties were aware of the change, and the parties are bound by the legislative change, as is this Agency.

The charge regarding the step increases does not state a claim. The Employer's defense under PA 54 is what I find the Legislature anticipated and intended and mandated: that step increases cease.

Not that there needs to be, but there is a clear rational basis for the legislative action. It sought to put economic pressure on parties to promptly resolve collective bargaining disputes, to reach final agreements, and it mandated the withholding of what would otherwise be wage increases as part of the mechanism of pushing the bargaining process forward.

I will be recommending that the charge be dismissed for failure to state a claim, as the inevitable conclusion here on the undisputed facts is that the Employer followed the new rules mandated by PA 54.

I should note what might be obvious to Counsel and should be understood by the parties, that this ruling is based on a change in the rules, that these attorneys, these parties have struggled to deal with those changes in the rules as have many others, and it hasn't been apparent to many how they are supposed to proceed with these new rules.

I want to thank Counsel for the arguments.

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 dismissed in its entirety.

**MICHIGAN EMPLOYMENT RELATIONS COMMISSION**

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 4, 2013