



**Bargaining/Mediation/
Fact-Finding: What's New
After the Education
Amendments**

MERC Act 312 & Fact-Finder
Training | April 18, 2013

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Agenda

- Prohibited Subjects (MCL §423.215(3) and (4)).
- 2011 PA 4 (Emergency Manager) (repealed by 2012 Proposal 1) & PERA Section 15(7) (MCL §423.215(7)) (not repealed by 2012 Proposal 1).
- PERA Section 15b (2011 PA 54) (MCL §423.215b).
- Publicly Funded Health Insurance Contribution Act (2011 PA 152) (MCL §15.561 *et seq.*) (*i.e.*, hard cap or 80/20).

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Prohibited Subjects

- "Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:..." MCL §423.215(3).
- The prohibited subjects listed within PERA 15(3) are "...within the sole authority of the public school employer to decide." §15(4).

Case Law

- *Michigan State AFL-CIO v. MERC*, 212 Mich App 472, 487 (1985), aff'd 453 Mich 362 (1996):
 - PSB may not be subject of enforceable contract provisions;
 - No duty to bargain regarding a PSB;
 - Parties may discuss a PSB;
 - Employer may act unilaterally regarding a PSB.
- See also, *Kalamazoo Public Schools and Kalamazoo Education Association and Lori Erk*, C12 D-074 (12/14/12 MERC decision without exceptions): language within contract concerning teacher transfers unenforceable prohibited subject and thus teacher has no claim against KEA for refusing to pursue teacher's transfer grievance. (20 day order; no precedential value.)

1994 PA 112

- Section 15(3)(a) Policyholder status.
- Section 15(3)(b) School starting day.
- Section 15(3)(c) Composition of school improvement committee.
- Section 15(3)(d) School of choice enrollment.
- Section 15(3)(e) Authorizing a public school academy.
- Section 15(3)(f) Subcontracting non-instructional services.
- Section 15(3)(g) Use of volunteers.
- Section 15(3)(h) Experimental/pilot programs/use of technology to deliver educational services and programs.
- Section 15(3)(i) Strike penalties.

2013 PA 103

Effective July 19, 2011 Seven more prohibited subjects

- Section 15(3)(j) – Teacher Placement.
- Section 15(3)(k) – Teacher Layoff and Recall.
- Section 15(3)(l) – Teacher Evaluation.
- Section 15(3)(m) – Discipline or Discharge.
- Section 15(3)(n) – Classroom Observations.
- Section 15(3)(o) – Performance-based compensation.
- Section 15(3)(p) – 2015/2016 Notice to Parents.



Practical Experience

- Pre 2012 Proposal 2.
 - Delay agreement.
 - Disagreement about scope of PSBs.
 - “Unenforceable” and oxymoronic letters of agreement about PSBs.
 - Listing of affected articles and disagreements.
 - Retaining PSB language but LOA stating PSBs unenforceable.
- ULPs filed, some litigation.

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Unilateral Modification/Deletion of Contract Language

- *Calhoun Intermediate Education Association and Calhoun ISD, CU12 B-009 (August 24, 2012, J. Stern):*
 - Union may not insist on inclusion of prohibited subjects in successor agreement.
 - Repeated insistence on inclusion violates duty to bargain in good faith.
 - On exceptions.
- *Ionia Public Schools and Ionia Education Association, C12 E-094 & CU12 C-013 (March 29, 2013, J. Stern). (“2011 PA 103 radically altered the landscape of bargaining for public school employers and the unions representing their teachers.”)*

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NOVEMBER 6 – WHAT VOTERS SAID

- Proposal 2 – Enshrine collective bargaining in the Michigan Constitution?
 - YES: 1, 944, 675 42%
 - NO: 2, 621, 766 ✓ 58%

Source: Unofficial Election Results, Secretary of State

Post 2012 Proposal 2

- “Reluctant” implementation by most EA units.
- “Discussion” not negotiation.
- Reorganization of collective bargaining agreements.
- Treatment of bargaining unit employees not subject to the education reforms.
 - Ancillary Staff.
 - Greater job security.
 - More favored treatment.
 - Rare exceptions.
- Board policies and administrative guidelines, unilaterally developed by District, “replace” contract provisions.
- ULPS filed, more litigation.

Grievance About A Prohibited Subject: Oxymoron?

- Unfair labor practice to file a grievance covering a prohibited subject.
- *Pontiac School District, C-11 K-197, CU12 D-019* (Hearing September 14, 2012, D. Peltz):
- ALJ Peltz issued a verbal ruling, to be followed by a written decision, that the processing of a grievance to arbitration where the basis of the grievance is a prohibited subject constitutes a violation of the union's duty to bargain in good faith.
- *Grand Rapids Public Schools & GRESPA, 23 MPER ¶5* (2009).

Teacher Placement, PERA §15(3)(j)

- One of the most controversial PSBs "in the field."
- Mixed application prior to recent MERC decisions.
 - *Pontiac School District and Pontiac Education Association, C12 D-079* (December 11, 2012, J. Stern)(practice of permitting teachers to choose assignments after layoff a PSB); exceptions filed.
 - *Ionia Public Schools, C12 G-136* (March 1, 2013, D. Peltz)("any criteria or policy (previously) in place which would have constrained the (teacher placement) decision...no longer binding"); exceptions not yet due.

Teacher Layoff & Recall

- Almost uniform consensus in the field to delete sections applicable to teachers.
- Retain CBA language as applicable to "ancillary staff."
- Uncertainty about duration of recall rights.
- Increased circuit court filings about application of MRSC §1248.
MCL §380.1248.

School Code Section 1248

- Sec. 1248. (1) For teachers, all of the following apply to policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position by a school district or intermediate school district:

Section 1248 Mandates Board Policies

- The board of a school district or intermediate school district shall ensure that the school district or intermediate school district adopts, implements, maintains, and complies with a policy ...based on retaining effective teachers.

No Protection for Ineffective Teachers

- The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under section 1249 is not given any preference that would result in that teacher being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under section 1249.

Tenure Act Also Amended

§ 38.82a. Probationary teacher rated as effective or highly effective; displacement.

Sec. 2a. A probationary teacher who is rated as effective or highly effective on his or her most recent annual year-end performance evaluation under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, is not subject to being displaced by a teacher on continuing tenure solely because the other teacher has continuing tenure.

§1248 MRSC Defines "Effectiveness"

- Effectiveness shall be measured by the performance evaluation system under section 1249, and the personnel decisions shall be made based on the following factors:
- Individual performance – majority factor.
 - Evidence of student growth, predominant factor.
 - Pedagogical skills, ability to manage classroom.
 - Discipline and attendance record.
 - Significant relevant accomplishments & contributions.
 - Relevant specialized training.
- Statute defines above criteria.

Clarifications Pending

- Application of MCL §380.1248 and §38.82a will be clarified by courts and to some extent by Tenure Commission.
 - E.g., *Baumgartner & Cole v. Perry Public Schools*, (STC 12-13; November 28, 2012): Teacher Tenure Commission retains jurisdiction regarding claim of appeal alleging subterfuge in layoff of tenured teacher, but no jurisdiction regarding recall decisions.

Teacher Evaluations PERA §15(3)(l)

- For the most part, consensus in the field that provisions applicable to teacher evaluation must be deleted or are unenforceable.
- Some dispute about ability to grieve or arbitrate same.
- MCL §380.1249(1) and (2) applicable to teachers and 1249(3) applicable to building-level and central office school administrators who are regularly involved in instructional matters.
- Michigan Council of Educator Effectiveness report due June 2013, with student growth 25% weight in performance evaluation rating effective 2013-2014.

Important Dates

Source: MDE Website

School Year	Tool Type	% of evaluation based on student growth & achievement data	Reporting Requirement
2011-2012	locally determined Educator Evaluation Systems	significant part*	effectiveness labels in June REP collection
2012-2013			
2013-2014	Governor's Council Evaluation Tool	25%	
2014-2015		40%	
2015-2016		50%	

Note: Michigan Council Educator Effectiveness, Second Interim Report, February 2013.

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Performance Evaluation Systems As of 2011-2012

- Student Growth.
 - Composite of national, state or local assessments & other objective criteria.
- Student Growth Measures
 - K-1: Local, DIBELS, MI Literacy, Work sampling, NWEA.
 - 2-5: State (4-5), local, DIBELS, Work sampling, MI Literacy, NWEA.
 - 6-8: State, Local, ACT Explore, Work sampling, NWEA.
 - 9-12: End-of-course assessment, ACT Plan, Work sampling, other, NWEA.
- Source: MDE Nov 2012 Report.

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MDE Report November 2012

- 50% use Charlotte Danielson Framework to evaluate teachers, sometimes with a local component.
- 400 MI districts assigned 11 to 30% weight to student growth in 2011-2012.
 - 200 MI districts assigned more than 30%.
- 2.8% rated Minimally Effective or Ineffective.
- 23% rated Highly Effective.
- More teachers rated below Effective in Priority Schools.

Teacher Discipline, Dismissal & Demotion PERA §15(3)(m)

- Another controversial PSB.
- Union argues
 - Standard of “arbitrary and capricious” should be specified in the CBA;
 - Discipline not within jurisdiction of Tenure Commission may still be grieved and arbitrated.
- Employer argues
 - Standard for discipline is explicitly listed as a PSB and mandated by §101 of Tenure Act;
 - Cannot arbitrate a PSB which is not specified within CBA;
 - PERA 15(4) gives employer “sole authority to decide.”
- Clarification pending...stay tuned!

Other PSBs within PERA §15

- Classroom Observations 15(3)(n) – subsumed by teacher evaluations;
- Notice of Ineffective Teacher 15(3)(o) – not applicable until 2015-2016;
- Performance-Based Compensation 15(3)(p) – MRSC Section 1250:
 - Varied implementation from nothing to modest payments to tying step increments to an evaluative rating of at least Effective.
 - Union may argue that Minimally Effective should receive same treatment.
- Freedom To Work Compliance 15(3)(q) – TBD;
- PERA 15(6) regarding priority schools identified pursuant to MRSC §380.1280c.

Policy Rationale for PSBs

- “The New Teacher Project” - tntp.org.
 - The Widget Effect (2009).
 - Teacher Evaluation 2.0 (2010).
 - A Smarter Teacher Layoff System (2010).
 - Smart Spending For Better Teacher Evaluation Systems (2011).
 - The Case Against Quality-Blind Layoffs. (2011).
 - MET Made Simple (2012).
 - Greenhouse Schools (2012).



•Setting the Stage



SECURITY OF THE TEACHER IN HIS JOB

“The record of a teacher’s work, which is kept by the principal and which might be produced to show incompetence, is a weak instrument for the purpose.

“Standards vary greatly from school to school. One principal’s ‘satisfactory’ might be equivalent to another’s ‘unsatisfactory.’ School authorities, in recognition of this, are evolving a new system of rating.”

— The New York Times (Victor H. Bernstein),
“Security of the Teacher in His Job,” May 24, 1936

“Let me be clear: If a teacher is given a chance, or two chances, or three chances, and still does not improve, there is no excuse for that person to continue teaching. I reject a system that rewards failure and protects a person from its consequences. The stakes are too high. We can afford nothing but the best when it comes to our children’s teachers and to the schools where they teach.”

— President Barack Obama, speech on education to the U.S. Hispanic Chamber of Commerce, March 10, 2009

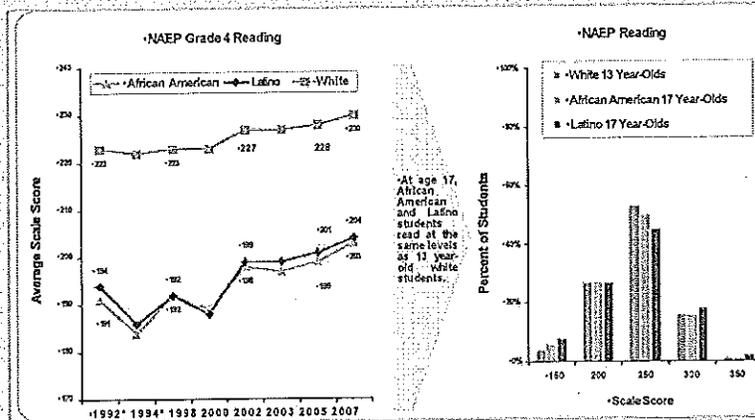


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A significant achievement gap separates white and minority students. By high school, minority students are four years behind white students.



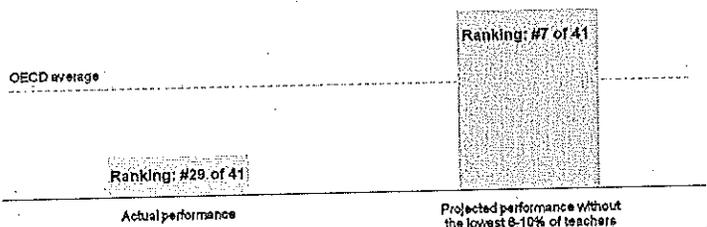
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Simply removing the very lowest-performing teachers would put the average U.S. student near the top of the developed world.

U.S. Student Achievement in Math vs. OECD Average (2003 PISA)



This improvement in student achievement would add as much as \$30 billion per year to U.S. GDP.

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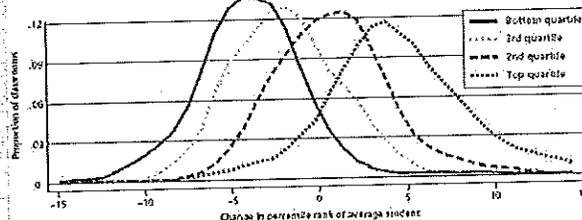
Source: Hanushek in *Creating a New Teaching Profession*, 2009

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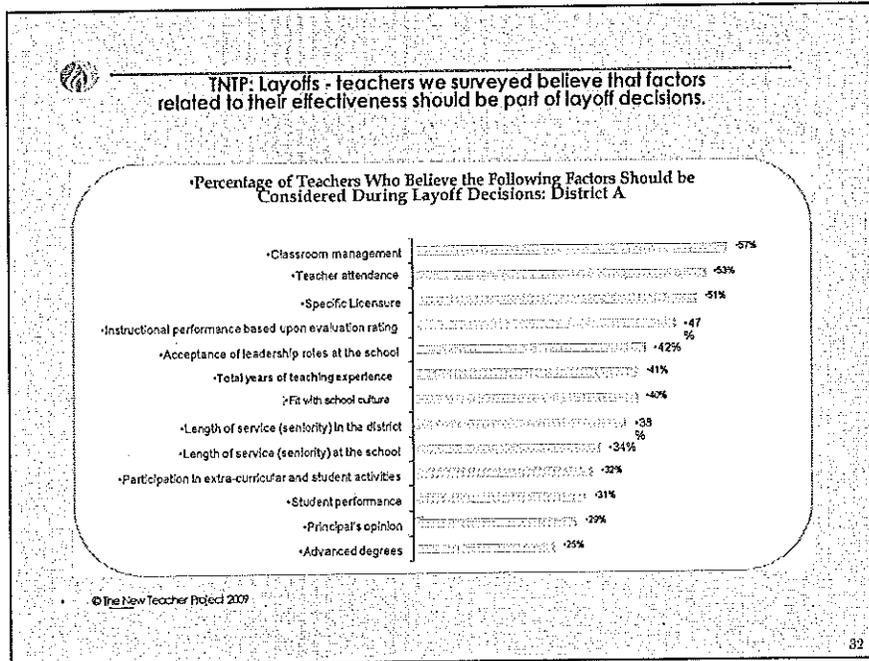
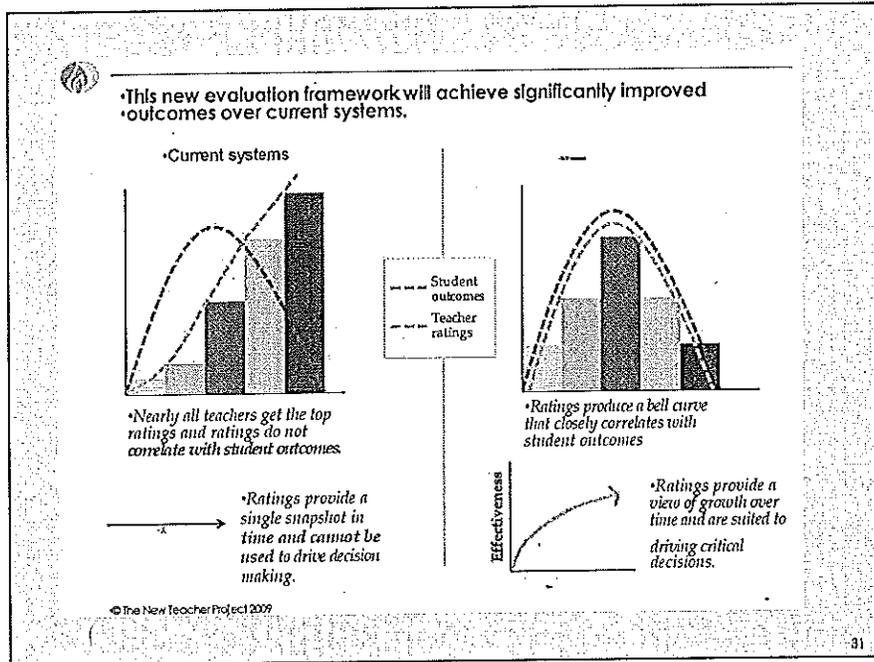
Impact of Effective Teachers is Ten Points

Figure 2. Teacher Impacts on Math Performance in Third Year By Ranking after First Two Years



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PERA Section 15b

- 423.215b Expiration date of collective bargaining agreement; wages and benefits; levels and amounts; retroactive levels and amounts prohibited; definitions.
- Sec. 15b.
- (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.
- (2) Except as provided in subsection (3), the parties to a collective bargaining agreement shall not agree to, and an arbitration panel shall not order, any retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration date of the collective bargaining agreement. (emphasis added)

Employer Perspective

- From a public school employer perspective, Section 15b gave school boards much needed leverage.
- Has resulted in earlier settlements in most districts.
- Creates a more intense, compressed period of time in which to complete negotiations.
- Initial Controversy: "Lane" Changes a/k/a track or column increments or rail increases

PA 54: ALJ CONFLICT ON LANE CHANGES—BEDFORD

Bedford Public Schools, C11 L-211 (June 6, 2012, D. O'Connor):

- After contract expiration, District initially paid lane increments to eligible staff but in October, reversed its position and began deducting the alleged overpayments.
- ALJ Doyle O'Connor held that salary adjustments based on increased educational attainment are not covered by the prohibitions in PA 54, finding that increased compensation for lane changes 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". Thus, the district was guilty of an unfair labor practice for unilaterally changing a term and condition of employment by withholding salary increases for lane changes.

PA 54: ALJ CONFLICT ON LANE CHANGES—WAVERLY

Waverly Community Schools, C11 K-206 (July 10, 2012, J. Stern):

- After contract expired June 30, District declined to pay increases to nine employees who had completed degree requirements.
- ALJ Julia Stern held that salary adjustments and lane changes based on increased educational attainment are covered by the prohibitions in PA 54, finding that they are "automatically triggered by the fulfillment of a condition", and there is nothing to indicate that the Legislature intended to exclude lane changes from the requirement that "employers pay wages at amounts and levels no greater than those in effect at the expiration of the contract". Thus, the union's unfair labor practice charge was dismissed.

Expedited Commission Decisions: 12/14/2012

- *Waverly* (C11 K-206): "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."
- "...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."
- MERC declined to address constitutionality of Act 54.
- *Bedford* (C11 L-211): "...Act 54 prohibits the payment of step increases whether based on increased years of service or educational achievement."
- The number of bargaining unit members eligible for education-based increases versus experience-based increases is irrelevant to determining legislative intent.
- How districts reacted...some had already paid lane increments, some had not...
- On appeal to the Michigan Court of Appeals.

2011 PA 152

- Is decision to elect 80/20 a mandatory, permissive or akin to prohibited subject of bargaining?
 - One election applicable to all employees within District;
 - Public school employers may not "opt out" of compliance;
 - Forfeit 10% of state aid if non-compliant.

Duty to Bargain 80/20 Election

- *Decatur Public Schools*, C12 F-123, C12 F-124 (December 20, 2012, D. O'Connor)
- ALJ O'Connor ruled that upon a union's request to bargain, "there is a duty to bargain over the Employer's discretionary choice between hard caps and the 80-20 option" regarding employer-provided health care costs under PA 152 of 2011.
- Absent agreement as of contract expiration, the "hard cap" is the default.
- On exceptions to Commission.

Other Issues

- Smoothing hard cap rates due to anomalous result with "two person" coverage
- Negotiating the annual CPI increase in hard cap rate
- Changing year to year from hard cap to 80/20 or vice versa
- Pre-funding of Health Savings Accounts
 - Per IRS, employer cannot recoup pre-funded amount if employee leaves
- Contributions toward non-medical insurance
- "Reimbursing" employees for their increased contributions
- PPACA compliance

Conclusion

- From Employer Perspective
 - Shorter Negotiations;
 - Compressed period of time due to PERA 15b;
 - Our own "March Madness 2013" due to FTW deadline;
 - Typically, more intense spring/summer;
 - More situations wherein districts handling their own negotiations over time.
 - Uncertainty about aspects of 2011 PA 152;
 - Greater emphasis on administrator training;
 - Cultural Mindset is shifting with varying degrees and speed;
 - Depending on economic issues, may be more frustration and anger to "absorb" at the local level;
 - Anger directed at boards who have little to no control;
 - PSBs not subject to mediation or Fact-finding;
 - Possible trend towards increased number of fact-finding petitions?
 - Greater use of MERC procedures for mediation and fact-finding.

Questions



Thank You!

Note: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.



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BARGAINING/MEDIATION/FACT-FINDING:

**WHAT'S NEW AFTER THE EDUCATION
AMENDMENTS?**

MERC Act 312 and Fact-Finding Training

April 18, 2013

A Union Perspective

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I. DUTY TO BARGAIN

Under Section 15(1) of the Public Employment Relations Act ("PERA"), "[a] public employer shall bargain collectively with the representatives of its employees . . . and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession." MCL 423.215(1).

- A. The Michigan courts have long held that in defining the scope of bargaining under PERA, the term "wages, hours and other terms and conditions of employment" should be interpreted broadly. *Local 1383 of the International Assn of Firefighters v City of Warren*, 411 Mich 642, 652; 311 NW2d 702 (1991). In fact the Court of Appeals has held that the scope of bargaining should be even more expansively construed under PERA than under the National Labor Relations Act ("NLRA") because public employees are forbidden from striking. *Detroit Police Officers Assn v City of Detroit*, 61 Mich App 487, 491; 233 NW2d 49 (1975).
- B. While the purpose of Section 15(3) of PERA was to remove the listed topics from the scope of bargaining, this does not alter the fact that historically the courts have interpreted the scope of bargaining under PERA broadly. Therefore, where ambiguities exist under Section 15(3), the language should be interpreted consistent with finding a duty to bargain.
- C. In return for depriving employees of the right to strike, the Legislature provided employees with mediation and fact-finding to help resolve disputes. *Melvindale-Northern Allen Park Public Schools*, 1985 MERC Lab Op 53. The Michigan Employment Relations Commission ("MERC") has emphasized the importance of mediation and fact-finding to the bargaining process. See, *Redford Union School Dist*, 23 MPER 32 (2010).

II. NEW LIMITATIONS ON THE DUTY TO BARGAIN FOR TEACHERS

A. General Comments

1. The limitations on the duty to bargain (MCL 423.215(3)) only apply to collective bargaining between a public school employer and a bargaining representative of its employees. A public school

employer is defined as "a public employer that is a board of a school district, intermediate school district, or public school academy"

2. The 2011 education amendments (PA 103) limit the ability of certificated teachers covered by the Teachers' Tenure Act to bargain over certain topics.
3. Teacher bargaining units are often broader than certificated teachers. Since the 2011 education amendments do not apply to non-certificated professionals, the broad duty to bargain set forth in Section 15(1) remains intact.
4. Instructional paraprofessionals and non-certificated professional staff now have more bargaining rights than teachers.

B. The 2011 Education Amendments to PERA

1. Section 15(3)(j), Teacher Placement – "Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit."
2. Section 15(3)(k), Teacher Layoff and Recall – "Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit."
3. Section 15(3)(l), Teacher Evaluation – "Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of the law, or the impact of those decisions on an individual employee or the bargaining unit."

4. Section 15(3)(m), Discipline or Discharge of Employees Covered by the Teachers' Tenure Act – "For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discipline or discharge of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101."
5. Section 15(3)(n), Classroom Observations – "Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 (Ex Sess) PA 4, MCL 38.83a, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit."
6. Section 15(3)(o), Performance-Based Compensation – "Decisions about the development, content, standards, procedures, adoption, and implementation of the method of compensation required under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions about how an employee performance evaluation is used to determine performance-based compensation under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit."
7. Section 15(3)(p), Notice to Parents and Legal Guardians – "Decisions about the development, format, content, and procedures of the notification to parents and legal guardians required under section 1249a of the revised school code, 1976 PA 451, MCL 380.1249a."

C. Open and Ongoing Legal Claims and Issues

1. Are contractual notice provisions to an individual teacher and/or the bargaining representative regarding layoff, recall, teacher

placement, evaluation, observation, and job vacancies unenforceable?

- a. *Ionia Public Schools*, Case No. C12 G-136 (March 1, 2013) (exceptions filed). The charge alleged that the District repudiated its contractual obligation to hold a "bid-bump" meeting and by failing or refusing to post vacancies for teacher positions in accordance with the collective bargaining agreement. The ALJ held:

"It is my conclusion that the amendment to PERA, Section 15(3)(j), unambiguously gives the Employer broad discretion to make placement decisions without bargaining the decisions or the effects thereof, and that any limitation on that discretion would be contrary to the plain meaning of the statute."

- b. *Pontiac School District*, Case No. C12 D-079 (December 11, 2012) (exceptions filed). The union claimed that the District repudiated a portion of the collective bargaining agreement dealing with layoff and recall. The ALJ concluded:

"Section 15(3)(j) of PERA makes decisions regarding teacher placement and the impact of those decisions prohibited subjects. I conclude that this section also made the party's practice of permitting teachers to choose their new assignment after being displaced by a layoff a prohibited subject of bargaining."

2. Can a public school employer and the bargaining representative of its teachers bargain over the incorporation of a board policy developed by the school board into a CBA?
3. Can a public school employer and the bargaining representative of its teachers bargain over the inclusion of the arbitrary or capricious standard in a CBA?
4. Can a bargaining unit of certificated teachers opt out of the Teachers' Tenure Act? How about a choice of forum provision?

III. LANE CHANGES IN LIGHT OF 2011 PA 54 (MCL 423.215b)

- A. Section 15b provides, in relevant part:

"Except as otherwise provided in this section after the expiration date of the 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."

- B. Two ALJ decisions were issued reaching the opposite conclusion as to whether lane or rail changes are frozen after contract expiration. Lane or rail changes are salary increases gained when a teacher completes a level of higher education beyond that which they entered the district with.
- C. The Commission concluded that lanes are frozen under PA 54 post-contract expiration until a successor agreement is reached. *Bedford Public Schools*, MERC Case No. C11 L-211 and *Waverly Community Schools*, MERC Case No. C11 K-206 (December 14, 2012). Both decisions of the Commission are on appeal to the Michigan Court of Appeals.

IV. EMPLOYEE HEALTH INSURANCE COSTS UNDER 2011 PA 152, MCL 15.561, *et seq.*

- A. The Act applies to most public employees and elected officials. The Act requires employees to pay 20% of health insurance costs or anything beyond the statutory hard caps. Cities, townships, villages, and counties may opt out of the law by a 2/3 vote of their governing body.
- B. Open and Ongoing Legal Claims and Issues.
 - 1. Is there a duty to bargain over the 20% of health costs or the hard cap? See, *Decatur Public Schools*, MERC Case No. C12 F-123, C12 F-124 (December 20, 2012) (exceptions filed). The ALJ concluded that upon a union's request to bargain prior to contract expiration, there is a duty to bargain over the choice between the hard caps and the 80/20 option. Absent agreement after contract expiration, the hard cap is the default.
 - 2. Is there a duty to bargain over smoothing? Smoothing refers to applying the aggregated hard caps to the total cost of insurance for the public employer and allowing each bargaining unit member to pay the same amount for his/her health insurance. Under this scenario, there is no additional cost to the employer. The benefit to the employees is that it spreads cost equally among the bargaining unit members and minimizes the harsh caps particularly with regard to the individual and spouse coverage.

3. Does an outstanding petition for fact-finding block implementation? Under long-existing MERC case law, an employer's imposition of a change in working conditions after the submission of the contract dispute to fact-finding is an unfair labor practice. *County of Wayne*, 1984 MERC Lab Op 1143. The Michigan Court of Appeals has affirmed the Commission's ruling in this regard. *AFSCME Council 25 v Wayne County*, 152 Mich App 87 1986), *lv denied*, 426 Mich 875 (1986). The Michigan courts have consistently held that PERA prevails over conflicting legislation. See, *Local 1383 of the International Assn of Firefighters v City of Warren*, 411 Mich 642 (1981).

In *West Iron County Public Schools*, Case No. C12 F-115, the parties are awaiting the ALJ's written bench decision granting the employer's Motion for Summary Disposition.

- C. Does PA 152 apply to universities with constitutional autonomy?
- D. Is there a duty to bargain regarding the 80/20 or hard caps for different bargaining units of the same employer?
- E. After the 80/20 or hard cap is implemented, is there an ongoing duty to bargain if circumstances change? See, *Decatur Public Schools*, *supra*.