

Administrative Rules Process in a Nutshell

Request for Rulemaking (RFR)	Requests to commence rulemaking can come from professional boards/commissions, advisory committees, the department, or the public. The RAO sends an RFR electronically to the ORR.
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Pre-Hearing Draft Rules	<ul style="list-style-type: none"> • Board/commission (and department) approves the draft; Regulatory Affairs Officer (RAO) of department or agency approves the draft. • ORR approves (after legal/policy review) and sends to LSB. • LSB edits and returns to ORR; ORR returns to department/agency for correction.
↓	
Public Hearing	<ul style="list-style-type: none"> • Regulatory Impact Statement and Cost-Benefit Analysis (the "why" and "\$" document) is approved by the RAO and sent to ORR for approval. • Public hearing notice and LSB-corrected rules are sent by RAO to ORR. • Newspaper ads (hearing notice secured by RAO). • <i>Michigan Register</i> (ORR publishes notice and rules). • Court reporter (secured by RAO). • Public comment period beyond public hearing noted in announcement.
↓	
Post-Hearing Draft Rules	<ul style="list-style-type: none"> • Board/commission (and department) approves rules. • Department submits to ORR for final approval. • ORR submits the final rules to LSB, and LSB has 21 days to certify the rules for form, classification, and arrangement. • ORR legally certifies (and can also certify for form if LSB did not complete the task in 21 days).
↓	
Joint Committee on Administrative Rules (JCAR)	<ul style="list-style-type: none"> • The rules must be submitted to JCAR within one year from the public hearing or there must be a subsequent public hearing. • JCAR Agency Report summarizes changes made after the public hearing. • JCAR has 15 session days to meet and object or waive the days.
↓	
Department or Agency Adopts the Rules, and ORR files the Rules with the Great Seal	<ul style="list-style-type: none"> • Department director adopts rules; or, the agency or commission adopts if it is a Type I agency/commission. • Rules can be filed by ORR with Great Seal after 15 JCAR session days expire, unless JCAR files a notice of objection, which gives them 15 session days to pass rules-stopping legislation and present it to the Governor. • ORR enters the filing date at the top of the first page of the rules and sends an electronic copy to the Great Seal and RAO. • The rules may become effective immediately upon filing or at a later date specified in the rules [MCL 24.245a(2)-(5)].

ORR = Office of Regulatory Reinvention

LSB = Legislative Service Bureau

MICHIGAN FREEDOM TO WORK IN THE PRIVATE SECTOR

Effective March 28, 2013, pursuant to the Labor Relations and Mediation Act (LMA), Act No. 176 of 1939 (Act), as amended by Act No. 348 of 2012, and consistent with Section 14(b) of the National Labor Relations Act, employees, as that term is defined in Section 2(e) of the Act, shall have the right to do or not to do any of the following activities:

- Organize together or form, join, or assist in labor organization;
- Engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection;
- Negotiate or bargain collectively with their employers through representatives of their own free choice.

The information contained herein applies to all employees as that term is defined by Section 2(e) of the Act.

PROHIBITED CONDUCT: Effective March 28, 2013, an individual shall not be required as a condition of obtaining or continuing employment to do any of the following:

- (1) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization.
- (2) Become or remain a member of a labor organization.
- (3) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount or provide anything of value to a labor organization.
- (4) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or employees represented by a labor organization.

Any person, employer, or labor organization that violates this prohibition shall be liable for a civil fine of not more than \$500.00. Any person who suffers an injury as a result of a violation or threatened violation of this prohibition may bring a civil action for damages, injunctive relief, or both. In addition, a court shall award court costs and reasonable attorney fees to a plaintiff who prevails in such a civil action.

The above prohibited conduct shall only apply to an agreement, contract, understanding or practice that takes effect or is renewed or extended after March 28, 2013.

PROHIBITED CONDUCT: Effective March 28, 2013, an employee or any other person shall not by force, intimidation or unlawful threats compel or attempt to compel any person to do any of the following:

- (1) Become or remain a member of a labor organization or otherwise affiliate with or financially support a labor organization.
- (2) Refrain from engaging in employment or refrain from joining a labor organization or otherwise affiliating with or financially supporting a labor organization.
- (3) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or employees represented by a labor organization.

Any person who engages in this prohibited conduct shall be liable for a civil fine of not more than \$500.00.

Additional information is available on our website at www.michigan.gov/merc. Interested parties may also contact:

Department of Licensing and Regulatory Affairs
Bureau of Employment Relations
Cadillac Place
3026 W. Grand Boulevard, Suite 2-750
PO Box 02988
Detroit, MI 48202-2988
Tel: 313-456-3510
Fax: 313-456-3511
Email: ftwinfo@michigan.gov

National Labor Relations Board
Detroit Regional Office
477 Michigan Avenue, Room 300
Detroit, MI 48226-2569
Tel: 866-667-NLRB/313-226-3200
Fax: 313-226-2090
Web site: www.nlr.gov

National Labor Relations Board
Grand Rapids Regional Office
Gerald R. Ford Federal Building
110 Michigan St. NW Room 299
Grand Rapids, MI 49503-2363
Tel: 866-667-NLRB/616-456-2679
Fax: 616-456-2596
Web site: www.nlr.gov

**BUREAU OF
EMPLOYMENT RELATIONS**

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LARA
LICENSING AND REGULATORY AFFAIRS
CUSTOMER DRIVEN. BUSINESS MINDED.

MICHIGAN FREEDOM TO WORK IN THE PUBLIC SECTOR

Effective March 28, 2013, pursuant to the Public Employment Relations Act (PERA), Act No. 379 of 1965 (Act), as amended by Act No. 349 of 2012, a "public employee," as that term is defined by Section 1(e) of the Act shall have the right to do or not do any of the following activities:

- Organize together or form, join, or assist in labor organizations;
- Engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection;
- Negotiate or bargain collectively with their public employers through representatives of their own free choice.

The information contained herein shall apply to any "public employee" as that term is defined in Section 1(e) of the Act to the maximum extent permitted under Section 4a of the Act.

PROHIBITED CONDUCT: Effective March 28, 2013, an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:

- (1) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.
- (2) Become or remain a member of a labor organization or bargaining representative.
- (3) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.
- (4) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

Any person, public employer, or labor organization that violates this prohibition shall be liable for a civil fine of not more than \$500.00. Any person who suffers an injury as a result of a violation or threatened violation of this prohibition may bring a civil action for damages, injunctive relief, or both. In addition, a court shall award court costs and reasonable attorney fees to a plaintiff who prevails in such a civil action.

The above prohibited conduct shall only apply to an agreement, contract, understanding or practice that takes effect or is renewed or extended after March 28, 2013.

The above prohibited conduct does not apply to a public police or fire department employee or any person who seeks to become employed as a public police or fire department employee as that term is defined under Section 2 of Act 312 of 1969, or to a state police trooper or sergeant who is granted rights under Article XI, Section 5 of the Michigan Constitution of 1963, or any individual who seeks to become employed as a state police trooper or sergeant.

PROHIBITED CONDUCT: Effective March 28, 2013, no person shall by force, intimidation or unlawful threats compel or attempt to compel any public employee to do any of the following:

- (1) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
- (2) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.
- (3) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

Any person who engages in this prohibited conduct shall be liable for a civil fine of not more than \$500.00.

Additional information is available on our website at www.michigan.gov/merc. Interested parties may also contact:

Department of Licensing and Regulatory Affairs
Bureau of Employment Relations
Cadillac Place
3026 W. Grand Boulevard, Suite 2-750
PO Box 02988
Detroit, MI 48202-2988

Tel: 313-456-3510 • Fax: 313-456-3511 • Email: ftwinfo@michigan.gov

**BUREAU OF
EMPLOYMENT RELATIONS**

LARA is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities. BER# 2013-02, 03-13

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LICENSING AND REGULATORY AFFAIRS
CUSTOMER DRIVEN BUSINESS MINDSET

***TRAINING OF MERC ACT 312 ARBITRATORS
AND FACT FINDERS***

The Inn at St. Johns
April 18, 2013

**MERC AND COURT DECISIONS
(Issued Since October 13, 2011)
AFFECTING ACT 312 AND FACT FINDING¹**

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Michigan Employment Relations Commission
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¹ Appreciation is extended to Sidney McBride, Verna Miller, Iryna Sazonova, Simon Haileab, Emily Warren and Carl Wexel for their assistance with the preparation of these case summaries

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I. DUTY TO BARGAIN AND EXTENT OF BARGAINING OBLIGATIONS

A. Permissive versus mandatory Subjects of Bargaining

1. Appellate Decisions

a. *Oakland University Chapter, American Association of University Professors -and- Oakland University,*

Court of Appeals No. 300680, issued February 9, 2012, unpublished, affirmed MERC Case No. C08 K-241, issued September 28, 2010, 23 MPER 86 (2010).

In an unpublished opinion, the Court of Appeals affirmed MERC's finding that the Employer committed an unfair labor practice by unilaterally repudiating a binding settlement between the Employer and the Union.

In 1999, the parties voluntarily entered into a settlement agreement regarding a grievance filed by the Union over an alleged violation of the parties' collective bargaining agreement. In the settlement agreement, the parties agreed to a certain interpretation of Article XXVIII of their contract, with the express agreement that such interpretation would prevail unless and until the contract language was changed. Further, the Employer expressly waived certain defenses to any future grievances asserting a violation of that provision of the collective bargaining agreement. The Employer agreed to not assert the jurisdictional defense that the issue is a governance matter, instead of a contract issue. The settlement was signed by the Employer's president and vice provost. In 2008, the Union filed a grievance alleging a violation of the same contract provision. In its response, the Employer asserted the very same jurisdictional defense that it agreed to waive in the 1999 settlement agreement. Based on the Employer's assertion of a previously waived defense, the Union then filed an unfair labor practice charge.

Contrary to the Employer's assertions, the Court of Appeals found the doctrine of repudiation can be applied to a grievance settlement, since a valid settlement agreement is as binding as any other contract between the parties. The Court quoted with approval MERC's statement in *City of Roseville*, 23 MPER 55 (2010), finding: "compromises that result in agreement provide stability to the parties' relationship and a degree of reliability to future interactions If settlements can be unilaterally revoked, both stability and the possibility of productive future discussions are undermined." The Court found MERC's reasoning in *City of Roseville* to be consistent with the public policy basis for the Labor Relations and Meditation Act, MCL 423.1.

The Court also found no merit to the Employer's argument that the settlement modified the collective bargaining agreement without Board approval. The Court concluded that MERC's factual finding, that the parties intended the settlement to interpret, rather than to amend, the collective bargaining agreement was supported by competent, material, and substantial evidence. Observing that Respondent had conceded that its board was not required to ratify a settlement agreement unless the settlement was an amendment to the collective bargaining agreement, the Court held that the Employer's board was not required to ratify the settlement in this matter.

The Court also rejected the Employer's argument that the settlement impermissibly interferes with its constitutional autonomy. Noting that the settlement involved a permissive subject of bargaining, that the Employer chose to bargain on the issue, and chose to interpret the contract provision through the settlement, the Court concluded that it would be illogical to find that enforcement of the settlement would impermissibly interfere with the "separation of academic governance and collective bargaining."

The Court observed that the Employer failed to notify the Union that action beyond the signatures of the president and vice-provost would be necessary to effectuate the terms of the settlement. The Court noted that it was reasonable for the Union to conclude that the representatives sent to the negotiations table by the Employer had the authority to settle routine grievances, and agreed with MERC's reasoning that it would be illogical to require the Union to question the authority of the Employer's agents, since it would be unlawful for the Union to do so under §10(3) of PERA. Inasmuch as the President and various vice presidents are among those to whom the Employer has delegated its contracting power, including the power to sign collective bargaining contracts, the Court rejected the Employer's argument that the president and vice-provost lacked apparent authority to bind the Employer to the terms of the settlement agreement.

Lastly, Respondent contended that its actions did not amount to repudiation because they did not have a substantial impact on the bargaining unit and there was a bona fide dispute over the interpretation of the settlement agreement. The Court agreed with MERC's reasoning in finding that the Employer's actions did have a significant impact on the bargaining unit because the action went to the core of the parties' previous agreement. In rejecting the Employer's argument that there was a bona fide dispute over the interpretation of the settlement, the Court pointed to the Employer's counsel's statement on the record, in which he acknowledged that the only dispute over the language of the settlement concerned its enforceability rather than its meaning. Therefore, the Court adopted MERC's conclusions that there was no bona fide dispute regarding the settlement language, the contract breach was significant, and the Employer committed an unfair labor practice.

2. Significant MERC Decisions

a. *University of Michigan –and– University of Michigan Skilled Trades Union,*

MERC Case No. C10 H-192, issued February 21, 2012.

Unfair Labor Practice Not Found—Employer Had No Duty to Bargain Over Installing Hidden Surveillance Cameras in a Room in Which Employees Did Not Perform Assigned Duties and Did Not Occupy With the Employer's Approval or Acquiescence; Area Where the Camera Was Installed Was Not Part of the Work Environment; Employees Had No Legitimate Expectation of Privacy in the Location Where the Hidden Camera Was Installed.

The Commission adopted the ALJ's recommendation to dismiss the Union's charge alleging that the Employer breached its duty to bargain in good faith when it installed a hidden surveillance camera on its premises.

The University of Michigan Skilled Trades Union (Union) filed an unfair labor practice charge alleging that the University of Michigan (Employer) breached its duty to bargain when it installed a hidden surveillance camera without first bargaining with the Union.

The Employer installed the camera in a room constructed on the Employer's premises by unknown persons without the Employer's knowledge. After installing the camera, the Employer discovered that the room was being used by two members of the bargaining unit represented by Charging Party. The two employees were engaging in unauthorized leisure activities when they were supposed to be working.

Finding that the use of a hidden camera was within the Employer's managerial right to supervise its employees, the ALJ found that the Employer had no duty to bargain over the installation of the camera and recommended that the Commission dismiss the charge. The ALJ also refused to apply federal case law holding that the installation of hidden surveillance cameras is a mandatory subject of bargaining.

In its exceptions, the Union contended that the ALJ erred by holding that the Employer had no duty to bargain over the installation of the hidden surveillance camera. The Union argued that the ALJ erred by refusing to follow NLRB precedent providing that the use of video surveillance is a mandatory subject of bargaining.

The Union contended that *Colgate-Palmolive Co*, 323 NLRB 515 (1997); *Brewers and Maltster's, Local No. 6 v NLRB*, 414 F3d 36 (DC Cir 2005); and *National Steel Corp v NLRB*, 324 F3d 928 (CA 7, 2003) each require an employer to bargain before installing a surveillance camera. In the cases that Charging Party relied on, matters were found to be mandatory bargaining subjects where they were "germane to the working environment and outside the scope of management decisions lying at the core of entrepreneurial control." In those cases, it was recognized that in the work environment, employees had legitimate privacy concerns and hidden surveillance cameras had the potential to affect employees' job security.

The Commission found the facts of this case to be distinguishable from the NLRB cases cited by the Union. In each of the three cases relied on by the Union, the hidden cameras were in locations considered to be part of the working environment and were placed where they would record the activities of employees who were legitimately at those locations. Here, the Employer installed a single camera for the limited and temporary purpose of discovering two specific things: the identity of persons frequenting a room that had been surreptitiously constructed without the Employer's knowledge or consent; and the nature of the activities occurring in that room. The room was located in an area in which employees did not perform assigned duties and did not otherwise frequent or occupy with the Employer's approval or acquiescence. The employees caught by the Employer's camera, had no legitimate expectation of privacy and the hidden room was not part of the "working environment." The Commission agreed with the ALJ that the Employer's use of a hidden camera in an area that is not part of the working environment is within management's right to supervise its employees during work time. Under these circumstances, the Employer did not have a duty to bargain over the placement of the surveillance camera.

B. Maintenance of Status Quo after Contract Expiration – 2011 PA 54

a. Bedford Public Schools -and- Bedford Education Association, MEA/NEA

MERC Case No. C11 L-211, issued December 14, 2012

Unfair Labor Practice Not Found; Respondent Did Not Breach Its Duty to Bargain by Failing to Comply with Provision of Expired Contract Requiring Payment of Wage Increases Based on Educational Achievement; § 15b of PERA, 2011 PA 54, Prohibits Payment of Wage Step Increases after Contract Expiration; Wage Increases Based on Educational Advancement Are Akin To Wage Step Increases. During the Period between Contract Expiration and the Effective Date of a Successor Agreement, Wage Increases Based on Educational Advancement Are Prohibited by § 15b of PERA.

The Commission reversed the ALJ's Decision and Recommended Order, which found that Bedford Public Schools (Employer) breached its duty to bargain when it failed to pay wage increases for educational achievement pursuant to its expired contract with Bedford Education Association, MEA/NEA (Union). The Commission held that the Employer did not commit an unfair labor practice, as it was prohibited from paying the wage increases at issue pursuant to § 15b of PERA, 2011 PA 54.

The Union, which represents a bargaining unit of teachers and certain other professionals, and the Employer were parties to a collective bargaining agreement that expired on June 30, 2010. At the time of the events leading to the charge in this case, the parties had not reached a successor agreement. The expired contract provided that employees would receive salary adjustments based on increases in their level of educational achievement and years of experience. In the beginning of the 2011-2012 academic year, the Employer paid increased wages to bargaining unit members whose educational achievement moved them to higher "lanes" on the salary grid. However on October 14, 2011, the Employer sent notice to the Union that § 15b of PERA requires wages to be frozen at contract expiration, until a successor agreement is reached. Subsequently, the Employer began deducting from bargaining unit members' wages to recover the previously paid wage increases that were based on educational achievement. Section 15b of PERA, which became effective on June 8, 2011, provides in relevant part:

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.

Before the effective date of 2011 PA 54, it was well-settled that when a collective bargaining agreement expired, a public employer had the continuing obligation to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reached agreement or impasse. Thus, before 2011 PA 54 was enacted, mandatory subjects of bargaining, such as cost of living adjustments and step increases, survived the contract by operation of law during the bargaining process unless there was a clear and unmistakable waiver. The passage of 2011 PA 54 altered the duty to bargain under PERA

by prohibiting public employers from making automatic wage adjustments, including step increases, after contract expiration. The issue before the Commission in this case was whether the prohibition against step increases after contract expiration applied to wage increases based on educational achievement.

The Commission explained that, 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, its task is to determine and give effect to the intent of the Legislature in adopting Act 54. To do so, the Commission first reviewed the statute's wording and, agreeing with the ALJ that the language of Act 54 is unambiguous, gave the words used in the statute their plain and ordinary meaning. The Commission concluded that 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. The Commission explained that if review of Act 54 is limited to its first sentence, one 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. By including the language: "The prohibition in this subsection includes increases that would result from wage step increases," the Legislature made 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.

The Commission noted that in past cases involving the employer's duty to make salary adjustments after contract expiration, the employer was required to pay wage increases due to increased years of service or educational advancement upon the occurrence of a designated event. Once the employee met the contract's years of service requirement or educational credential requirement, the employer was obligated to pay the increased wage. See for example *Sandusky Cmty Sch*, 22 MPER 90 (2009); *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. While noting the difference between the conditions triggering an employer's obligation to pay such wage increases, the Commission pointed out that it has made no distinction between the legal effects of these types of provisions as mandatory subjects of bargaining. Moreover, in discussing wage increases based on increased years of service or educational achievement, the Commission has frequently referred to both types of increases as "step increases."

Principles of statutory construction hold that the legislature is presumed to be aware of statutory interpretations by the administrative bodies charged with statutory enforcement. The Commission explained that prior to the decision in this case and the decision in *Waverly Community Schools -and- Ingham County Education Assn/ Waverly Education Assn*, Case No. C11 K-206, which was issued concurrently, the Commission has made no legal distinction between wage increases based on educational advancement, which are sometimes known as "lane changes" or "rail increases" and wage increases based on increased experience. Since the Commission has historically treated wage increases based on educational advancement the same as wage increases based on increased experience, it concluded that the Legislature would do the same. Accordingly, the Commission found that by stating "the prohibition in [2011 PA 54] includes increases that would result from wage step increases," the Legislature was extending that prohibition to wage increases based on either increased years of service or educational advancement.

This case is currently on appeal to the Michigan Court of Appeals.

b. Waverly Community Schools -and- Ingham County Education Assn/ Waverly Education Assn
MERC Case No. C11 K-206, issued December 14, 2012

Unfair Labor Practice Not Found; Respondent Did Not Breach Its Duty to Bargain by Failing to Comply with Provision of Expired Contract Requiring Payment of Wage Increases Based on Educational Achievement; § 15b of PERA, 2011 PA 54, Prohibits Payment of Wage Step Increases after Contract Expiration; Wage Increases Based on Educational Advancement Are Akin To Wage Step Increases. During the Period between Contract Expiration and the Effective Date of a Successor Agreement, Wage Increases Based on Educational Advancement Are Prohibited by § 15b of PERA.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Waverly Community Schools (Employer) did not commit an unfair labor practice when it failed to pay wage increases for educational achievement pursuant to its expired contract with Ingham County Education Association/Waverly Education Association (Union). The Commission agreed with the ALJ that the prohibition against wage increases following the expiration of a collective bargaining agreement in § 15b of PERA, 2011 PA 54, includes increases based on enhanced educational credentials and that the Employer had no obligation to pay such increases after contract expiration.

The Union, which represents a bargaining unit of teachers and certain other professionals, and the Employer were parties to a collective bargaining agreement that expired on June 30, 2011. The contract provided that employees would receive salary adjustments based on increases in their level of educational achievement and years of experience. The contract provided eleven vertical salary steps based on years of experience and six horizontal salary "lanes" based on level of education. The parties had not reached a successor agreement when their contract expired on June 30, 2011. After the contract expired, but before the parties reached a successor agreement, nine bargaining unit members provided the Employer with evidence of educational achievement, which they contended entitled them to horizontal salary lane increases. Respondent declined to pay the salary increases based on 2011 PA 54, which became effective on June 8, 2011, and provides in relevant part:

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.

Before the effective date of 2011 PA 54, it was well-settled that when a collective bargaining agreement expired, a public employer had the continuing obligation to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reached agreement or impasse. Thus, before 2011 PA 54 was enacted, mandatory subjects of bargaining, such as cost of living adjustments (COLA) and step increases, survived the contract by operation of law during the bargaining process unless there was a clear and

unmistakable waiver. The passage of 2011 PA 54 altered the duty to bargain under PERA by prohibiting public employers from making automatic wage adjustments, including step increases, after contract expiration. The issue before the Commission in this case was whether the prohibition against step increases after contract expiration applied to wage increases based on educational achievement.

The Commission noted that in past cases involving the employer's duty to make salary adjustments after contract expiration, the employer was required to pay wage increases due to increased years of service or educational advancement upon the occurrence of a designated event. Once the employee met the contract's years of service requirement or educational credential requirement, the employer was obligated to pay the increased wage. See for example *Sandusky Cmty Sch*, 22 MPER 90 (2009); *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. While noting the difference between the conditions triggering an employer's obligation to pay such wage increases, the Commission pointed out that it has made no distinction between the legal effects of these types of provisions as mandatory subjects of bargaining. Moreover, in discussing wage increases based on increased years of service or educational achievement, the Commission has frequently referred to both types of increases as "step increases."

Principles of statutory construction hold that the legislature is presumed to be aware of statutory interpretations by the administrative bodies charged with statutory enforcement. The Commission explained that, prior to the decision in this case and the decision in *Bedford Public Schools-and- Bedford Education Association, MEA/NEA*, Case No. C11 L-211, which was issued concurrently, MERC has made no legal distinction between wage increases based on educational advancement, which are sometimes known as "lane changes" or "rail increases" and wage increases based on increased experience. Since the Commission has historically treated wage increases based on educational advancement the same as wage increases based on increased experience, it concluded that the Legislature would do the same. Accordingly, the Commission found that by stating "the prohibition in [2011 PA 54] includes increases that would result from wage step increases," the Legislature was extending that prohibition to wage increases based on either increased years of service or educational advancement.

This case is currently on appeal to the Michigan Court of Appeals.

C. Past practice

1. Significant MERC Decisions

- a. County of Wayne—and—Michigan AFSCME Council 25 and its Affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926, and 3309*
MERC Case No. C09 J-211, issued September 17, 2012

Unfair Labor Practice Found- Retirement and Health Care Benefits are Mandatory Subjects of Bargaining; Employer Violated Duty to Bargain by Unilaterally Changing the Past Practice of Providing Health Care Benefits to Employees Who Retire on Duty or Non-Duty Disability Pensions; The Past Practice of the Parties Was Binding and Any Change Required Notice of and an Opportunity to Bargain.

The Commission majority affirmed the ALJ's Decision and Recommended Order on Summary Disposition which found that Respondent, Wayne County (Employer), violated

§10(1)(e) of PERA by eliminating the practice of not requiring retirees receiving pensions based on disability to meet age or service requirements for health care benefits, without first bargaining over the subject with Charging Parties, Michigan AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926, and 3317.

For over thirty years, Respondent consistently provided health care benefits to retirees receiving a duty disability pension without regard to age or years of service and to retirees receiving a non-duty disability pension with ten years of credited service. Since at least 2000, the parties' collective bargaining agreements have limited health care benefits to retirees who meet certain age and service requirements. However, none of the parties' agreements covering the years 2000-2004 expressly address health care benefits for those who retire on the basis of disability. In 2008, the parties executed collective bargaining agreements covering the years 2004-2008. Later in 2008, Respondent and bargaining units represented by several of the Charging Parties executed collective bargaining agreements covering 2008-2011. After 2008, Respondent continued to provide health care benefits to retirees receiving a disability pension without regard to age or years of service. In March 2010, Respondent issued an administrative order announcing that it would only provide health care benefits to recipients of disability pensions who met the age and years of service requirements for a standard pension.

In its exceptions, Respondent argued that it did not have a duty to bargain over the change because the past practice was superseded by collective bargaining agreements executed by the parties in 2008. Respondent pointed to language incorporated in the 2008 contracts which reserves the right of Respondent's benefit administrator to make final determinations as to all issues concerning eligibility for benefits. However, the language Respondent relied on was also incorporated in the 2000-2004 collective bargaining agreements. The Commission majority also found the parties' 2000-2004 collective bargaining agreements generally tied eligibility for health care benefits to eligibility for a pension and made no mention of health care benefits for those who retire on the basis of disability. On comparing the language of those contracts with that of the 2004-2008 and 2008-2011 collective bargaining agreements, the Commission found there was no appreciable difference with respect to with respect to the eligibility of disability pension recipients for health care benefits. In the absence of language specifically addressing disability pension recipients' eligibility for health care benefits, the Commission found no support for Respondent's contention that the past practice was superseded by the contracts executed in 2008.

Further, the Commission majority found no evidence in the record indicating that Charging Parties were aware at the time the 2004-2008 and 2008 -2011 collective bargaining agreements were executed that retirees receiving disability pensions would no longer be eligible for health care benefits unless they met the age and years of service requirements for a standard pension. The Commission found that Respondent failed to show that Charging Parties waived their right to bargain over the termination of the past practice. Absent an explicit, clear, and unmistakable waiver of bargaining rights, Respondent was not relieved of its duty to give the unions notice and an opportunity to bargain before deciding to terminate the past practice.

The ALJ suggested that the Commission award attorney fees to Charging Parties in the light of four recent decisions in which Respondent was found to have violated its duty to bargain and based on Respondent's actions in eliminating the past practice. The ALJ

urged the Commission to reconsider its interpretation of *Goolsby v Detroit*, 211 Mich App 214 (1995), and assess costs and attorney fees against Respondent. The Commission majority agreed with the conclusion in *Goolsby* finding that the language of § 16(b) of PERA is not sufficiently specific to authorize the Commission to grant attorney fees.

The concurring commissioner agreed that Respondent breached its duty to bargain. However, he found that, while this was not an appropriate case for an award of attorney fees, given the NLRB's precedent on assessing attorney fees, he is not willing to conclude that the Commission lacks the authority to award attorney fees in an appropriate case.

The third commissioner dissented in part and concurred in part. He agreed that the language of § 16(b) of PERA does not authorize the Commission to grant attorney fees. However, he concluded that Respondent did not violate its duty to bargain in good faith under §10(1)(e) and determined that the charge should be dismissed. The dissenting commissioner disagreed with the majority's adoption of the ALJ's finding that the collective bargaining agreement was ambiguous and that Respondent gave "tacit approval" to the contract's modification by the past practice of providing health care benefits to retirees receiving disability pensions. The commissioner found Respondent's 2006 Health and Welfare Benefit Plan was fully incorporated into the collective bargaining agreements. Additionally, the Commissioner found that the contract language established that Charging Party and Respondent bargained over health care benefits and retirees' eligibility for such benefits. He concluded that Respondent's past practice of not enforcing the age and service requirements for health care benefits with respect to recipients of disability pensions did not waive its right to do so. As a result, the dissenting commissioner held that Respondent had not committed an unfair labor practice by electing to enforce the terms of the contract.

In conclusion, the Commission majority affirmed the ALJ's finding that Respondent unlawfully made a unilateral change to terms and conditions of employment without first giving Charging Parties notice and an opportunity to bargain over whether the age and service requirements for health care benefits should begin to apply to recipients of disability pensions. The majority also found that § 16(b) of PERA does not authorize the Commission to award attorney fees.

This case is currently on appeal to the Michigan Court of Appeals.

b. Southfield Public Schools –and- Michigan Educational Support Personnel Association (MESPA) –and- Educational Secretaries of Southfield,

Case Nos. C09 B-017 and C09 B-019, issued November 15, 2011.

Unfair Labor Practice Found; Unilateral Change; Employees' Receipt of Paid Association Release Time was Established Term or Condition of Employment; Employer Violated Duty to Bargain By Eliminating Paid Association Release Time Without First Giving Unions Notice and Opportunity to Bargain.

The Commission adopted the ALJ's factual findings and legal conclusions in support of its decision holding that Southfield Public Schools (Employer) violated its duty to bargain in good faith.

The Michigan Educational Support Personnel Association and the Educational Secretaries of Southfield (Unions) each alleged that the Employer violated its duty to bargain by discontinuing its practice of providing the Unions' members with paid association release time without first giving the Unions notice and an opportunity to bargain over the matter. The Employer asserted that paid association release time was not an established term or condition of employment because the parties' collective bargaining agreements unambiguously provided that only the Unions' presidents would be paid for release time. The Employer also asserted that even if it did have a duty to bargain over the elimination of paid association release time, the Unions waived their rights by failing to make a timely demand to bargain over the issue.

Paid time to engage in union activities during working hours is a mandatory subject of bargaining. The Commission agreed with the ALJ that the provisions of the parties' collective bargaining agreements were ambiguous as to whether the Employer was required to pay association release time, and that Employer's practice of paying for this time was not contrary to the clear language of the contract. The record showed that Respondent had consistently paid association release time to the Unions' officers and members over at least twenty years for the MESPA unit and at least ten years for the ESOS unit. Therefore, the Commission agreed with the ALJ's conclusion that the past practice of paying association release time to employees had become an established term or condition of employment for both bargaining units.

Without having previously raised the issue at the bargaining table, the Employer notified the Unions of its decision to end its long-term practice by sending the Unions a letter a few days before decision's effective date. The Commission further agreed with the ALJ that merely giving notice to the Unions that the Employer was terminating the past practice was not sufficient. The Employer had an obligation to give the Unions an opportunity to bargain before it eliminated the practice.

The Commission also agreed with the ALJ's rejection of the Employer's argument that the Unions had waived their right to bargain over the matter by failing to make a timely demand. In cases where a bargaining demand would be futile because the employer had already made a final decision on the issue when it notified the union of the change, the union has no obligation to demand bargaining. In this case, the Employer's letter notified the Unions of the effective date of the change in practice, but said nothing about giving the Unions an opportunity to bargain over the issue. The Employer's notice invited the Unions to call if they wished to discuss the matter, but did not indicate that implementation of the change was conditioned on the parties failing to reach agreement on the issue. When the Unions contacted the Employer to object to the change prior to its effective date, the Employer merely replied that it was following the contract. Thus, it was clear from the Employer's notice to the Unions and their subsequent discussion that the Employer's decision was final and a demand to bargain would be futile. When the Unions made a subsequent demand to bargain over paid association release time, the Employer claimed the demand was untimely and refused to bargain. Accordingly, the Commission found that the Unions did not waive their right to bargain over the elimination of paid association release time. The Commission, therefore, adopted the ALJ's recommended order requiring the Employer to cease and desist from making unilateral changes in terms and conditions of employment and to reinstate the practice of paying for association leave time until it has satisfied its obligation to bargain with the Unions over the issue.

D. Transfer of bargaining unit work and subcontracting

1. Appellate Decisions

- a. *Pontiac School District -and- Pontiac Education Association*, Court of Appeals No. 300555, issued January 5, 2012 for Publication, affirmed MERC Case No. C04 H-215; issued September 22, 2010, 23 MPER 81.

In a split decision, the Court of Appeals majority affirmed MERC's decision in favor of the charging party, Pontiac Education Association ("PEA"), finding that the Respondent, Pontiac School District (Employer) committed an unfair labor practice when it unilaterally decided to contract with a third party to provide certain educational services without bargaining with the PEA.

In May of 2004, the Employer decided to privatize services that had been provided by occupational therapists and physical therapists employed by the school district. The PEA asserted that the Employer could not act unilaterally to privatize these services because the issue was subject to bargaining under the parties' collective bargaining agreement. The Employer laid off the occupational and physical therapists anyway, and contracted with a private entity to provide occupational and physical therapy services. The PEA filed an unfair labor practice charge.

The dispute concerned the interpretation of MCL 423.215(3)(f), which provides that the decision of a school district to contract with a third party for one or more "non-instructional support services" is not subject to bargaining. Under the statute, "non-instructional support services" may be contracted out to third parties without collectively bargaining. The terms "instructional" and "non-instructional" are not defined in the statute. The Administrative Law Judge's (ALJ) decision, which was affirmed by MERC, turned on the meaning of "non-instructional." The ALJ and MERC both upheld the PEA's unfair labor practice charge, concluding that the occupational and physical therapists did not provide "non-instructional support services."

On appeal, the Employer argued that the occupational and physical therapists provide non-instructional support services; the PEA argued that they provide instructional support services.

The Court of Appeals majority analyzed the statute by giving words or phrases that are not statutorily defined their "plain and ordinary" meaning within the context used in the statute. This principle supports the ALJ's and MERC's reasoning that the word "instruction" is not limited to teaching core curriculum subjects, such as math or science, but has a more general meaning that extends to imparting knowledge of any kind. Based on this interpretation, the majority held that positions in which individuals impart any type of knowledge or information to students are "instructional," and their services are not exempt from collective bargaining under MCL 423.215(3)(f).

The Court majority rejected the Employer's argument that the ALJ and MERC improperly failed to consider legislative history in rendering their decisions. The ALJ and MERC properly refused to rely on legislative history, because legislative history is not to be used to interpret statutes unless the statute is ambiguous. The Court determined that the statute

in question is not ambiguous, and the ALJ and MERC were correct in focusing on the plain language of the statute.

At the hearing before the ALJ, the Employer presented evidence from expert witnesses offering their opinions that the therapists did not provide instruction. The therapists testified as to their roles in the school, and MERC concluded that the therapists fairly characterized their responsibilities as helping students develop the skills necessary to be able to receive traditional classroom instruction from the other teachers. This evidence, along with the plain and ordinary meaning of “instruction,” led MERC to conclude that the therapists do not provide noninstructional support services. The Court majority found that MERC’s decision was supported by substantial, competent, and material evidence.

The Court of Appeals affirmed MERC’s decision, reasoning that there is an instructional component to the services provided by the occupational and physical therapists, even though their instruction was not the traditional classroom variety. Regardless of how the therapists’ instruction is characterized, the Court held that the therapists did not provide “non-instructional support services” for the purposes of exempting the school district from the duty to collectively bargain over subcontracting the therapists’ services.

The dissenting opinion incorporated definitions from other statutes to interpret the meanings of “instructional” and “non-instructional” and determined that the services provided by the therapists are not part of the traditional classroom environment, and are not “instructional” within the “commonly understood” meaning of the term.

The Michigan Supreme Court denied the Employer’s an application for leave to appeal.

2. Significant MERC Decisions

- a. *City of Detroit -and- American Federation of State, County and Municipal Employees (AFSCME), Local 207*
MERC Case No. C10 E-119, issued July 20, 2012

Unfair Labor Practice Found – Employer Breached Duty to Bargain When it Unilaterally Decided to Transfer Work Exclusively Performed by Bargaining Unit Employees to a Different Bargaining Unit or to an Outside Contractor; Exclusivity of Bargaining Unit Work Not Destroyed by Prior De Minimis Transfer of that Work to Another Bargaining Unit. Omission of Details from Charge is Not Prejudicial When Underlying Facts are Fully Litigated; Failure to Object to Litigation of Issue Before ALJ Waives the Objection and Bars Filing Exceptions on that Issue.

The Commission affirmed the ALJ’s Decision and Recommended Order finding that Respondent, City of Detroit (Employer), violated §10(1)(e) of PERA when it unilaterally decided to lay off employees in the Street Lighting Maintenance Worker (SLMW) classification, which was represented by the Charging Party, American Federation of State, County and Municipal Employees, Local 207 (Union), and to replace them with line workers represented by the International Brotherhood of Electrical Workers (IBEW). The Commission also agreed with the ALJ’s finding that the Employer breached its duty to bargain when it laid off the sole employee in the AFSCME represented Public Lighting

Department's repair mechanic classification and transferred the repair mechanic's work to a private contractor.

In its exceptions, the Employer alleged that the ALJ exceeded the scope of the charge when he made a decision regarding the repair mechanic. The Commission found that, although the charge did not identify the job classifications of the affected employees, the record revealed that there were two classifications at issue, the SLMW and the repair mechanic. Furthermore, the Commission noted that at no point in the record, prior to filing its exceptions, did the Employer object to the Union raising, or the ALJ considering, the issue of the subcontracting of the work performed by the repair mechanic. Had the Employer objected while the matter was still before the ALJ, the Union could have timely moved to amend the charge to include the allegations regarding the repair mechanic and the issue could have been resolved by the ALJ. Instead, the Employer waited until it filed its exceptions to raise the issue. By that point, it was too late to raise the objection and the Commission determined that the Employer's failure to timely object constituted a waiver of its objection and barred the filing of an exception on that issue. The Commission agreed with the ALJ that the repair mechanic had exclusively performed the work of repairing traffic lights and affirmed the ALJ's conclusion that the Employer violated its duty to bargain under §10(1)(e) when it unilaterally decided to subcontract that work.

Next, the Employer argued that the ALJ erred by finding that SLMWs exclusively performed the street lighting repair work. Although the Employer argued that the IBEW line workers had also performed street lighting repair work, the record showed that the work performed by the line workers was distinctly different from the work performed by the SLMWs. For several decades, the SLMWs' essential functions had included the inspecting, repairing and replacing of light fixtures on street light poles. The Employer contended that the line workers had also performed these tasks since at least 2004. The Employer had made infrequent assignments of SLMW overtime work to line workers. As these assignments did not have a significant effect on the bargaining unit, they could not form the basis for a charge of contract repudiation. The Union's only recourse was to grieve the Employer's actions. The Commission noted that the Union had grieved the Employer's occasional assignments of these tasks to IBEW line workers and the grievances were still pending. The Commission concluded that the contested and de minimis assignments of SLMW work did not destroy the exclusivity of the essential functions of the SLMWs' work. Thus, the Commission found that the Employer breached its duty to bargain when it transferred work that had been exclusively performed by the SLMWs.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent, City of Detroit (Employer), violated §10(1)(e) of PERA when it unilaterally decided to lay off employees in the Street Lighting Maintenance Worker (SLMW) classification, which was represented by the Charging Party, American Federation of State, County and Municipal Employees, Local 207 (Union), and to replace them with line workers represented by the International Brotherhood of Electrical Workers (IBEW). The Commission also agreed with the ALJ's finding that the Employer breached its duty to bargain when it laid off the sole employee in the AFSCME represented Public Lighting Department's repair mechanic classification and transferred the repair mechanic's work to a private contractor.

In its exceptions, the Employer alleged that the ALJ exceeded the scope of the charge when he made a decision regarding the repair mechanic. The Commission found that, although the charge did not identify the job classifications of the affected employees, the record revealed that there were two classifications at issue, the SLMW and the repair mechanic. Furthermore, the Commission noted that at no point in the record, prior to filing its exceptions, did the Employer object to the Union raising, or the ALJ considering, the issue of the subcontracting of the work performed by the repair mechanic. Had the Employer objected while the matter was still before the ALJ, the Union could have timely moved to amend the charge to include the allegations regarding the repair mechanic and the issue could have been resolved by the ALJ. Instead, the Employer waited until it filed its exceptions to raise the issue. By that point, it was too late to raise the objection and the Commission determined that the Employer's failure to timely object constituted a waiver of its objection and barred the filing of an exception on that issue. The Commission agreed with the ALJ that the repair mechanic had exclusively performed the work of repairing traffic lights and affirmed the ALJ's conclusion that the Employer violated its duty to bargain under §10(1)(e) when it unilaterally decided to subcontract that work.

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b. Rochester Community Schools -and- American Federation of State, County and Municipal Employees (AFSCME), Council 25 and Its Affiliated Local 202

MERC Case No. C10 H-190, issued July 20, 2012

Unfair Labor Practice Not Found – Public School Employer Subcontracting Noninstructional Support Services; No Duty to Bargain over Bidding Procedure If Union Representing Bargaining Unit Currently Providing such Services is Permitted to Bid on Equal Basis with other Bidders; Bidding Requirements and Procedures Need Not Be Tailored to Meet Characteristics of Labor Organizations; If Employer fails to Allow Union to Submit Bid on Equal Basis with Third Party Contractors, Statutory Prohibition Against Bargaining is Removed; Failure to Submit Bid Waives Argument as to not Receiving Opportunity to Bid on Equal Basis.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent, Rochester Community Schools (Employer), did not violate its duty to bargain when it refused to negotiate with the Charging Party, AFSCME (Union), over the process for submitting bids to provide noninstructional support services. The Commission also agreed with the ALJ's finding that, pursuant to §1(e)(i) of PERA, the Employer had no obligation to recognize the Union as the bargaining representative for the individuals employed by the subcontractor .

The Employer issued a request for proposals (RFP) for "professional hall monitoring services." The RFP listed qualifications that were to be met by successful bidders. Additionally, the RFP provided bidders with an opportunity to request exceptions to its terms and conditions. However, the Union did not submit a bid in response to the RFP. Furthermore, the Employer denied the Union's request to bargain over the decision to subcontract and the procedures for bidding. As a result, the Union filed an unfair labor practice charge.

In its exceptions, the Union objected to the ALJ's finding that the Employer had no duty to bargain over the terms of its RFP or the bidding procedures. In the factually similar case of *Lakeview Cmty Sch*, 25 MPER 37 (2011), the Commission held that §15(3)(f) of PERA did not mandate bargaining over the bidding procedures, because those procedures are also prohibited subjects of bargaining. Relying on *Lakeview*, the Commission rejected the Union's arguments and found that, under §15(3)(f), a public school employer that has decided to subcontract noninstructional support services is only obligated to provide the union representing the employees who perform those services with the opportunity to bid on the contract on an equal basis with third party bidders. A public school employer only has a duty to bargain over subjects of bargaining prohibited under §15(3)(f) if the union is not given an equal opportunity to bid.

The Union also argued that the Employer's RFP was designed for response by third party contractors and that the Union is not capable of bidding on an equal basis with such contractors as it was unrealistic to expect it to meet certain RFP requirements. However, the RFP in this case allowed bidders the opportunity to request exceptions to the RFP's requirements. Therefore, the Commission rejected the Union's argument quoting *Lakeview*, which stated: "Because [the Union] did not submit a bid, and did not request an exception to any of the RFP's requirements, it cannot now complain that it was not given an equal opportunity to bid." In the absence of a bid by the bargaining unit, any claim that they were denied the opportunity to bid on an equal basis with third party bidders was waived.

Lastly, the Union alleged that the Employer was a joint employer of the employees hired by the third-party contractor and had unlawfully refused to recognize it as the bargaining representative for those employees. The Commission rejected this argument and noted that under §1(e) of PERA, workers hired by private entities having contracts with the state or a political subdivision thereof, such as the employees here, are not public employees. Thus, the Employer was not a joint employer with the private contractor and had no obligation under PERA to recognize the Union as the bargaining representative for those employees.

c. *Southfield Public Schools –and- Southfield Michigan Educational Support Personnel Association,*
Case No. C08 F-115, issued October 17, 2011.

Unfair Labor Practice Not Found- Employer's Decision to Subcontract Non-Instructional Support Services is a Prohibited Subject of Bargaining; Issue of Lawfulness of Employer's Decision to Subcontract Raises Questions of Fact, Which Could Not be Decided on Summary Disposition; Charging Party Failed to Show Employer's Decision to Subcontract Non-Instructional Support Services was Motivated by Anti-Union Animus.

The Commission agreed with the ALJ's conclusion that Southfield Michigan Educational Support Personnel Association's (Union), did not show that Southfield Public Schools (Employer), discriminated against the Union's members by deciding to subcontract noninstructional support services. The Commission adopted the ALJ's recommended order to dismiss the unfair labor practice charge.

PERA §15(3)(f) provides that a public school employer's decision to contract with a third party for noninstructional support services is a prohibited subject of bargaining. Nevertheless, the Employer's decision to subcontract may be subject to review. A decision, which may otherwise be within the Employer's authority, may be an unfair labor practice if the decision is motivated by unlawful discriminatory intent. The question of the Employer's intent is one of fact and required an evidentiary hearing. Therefore, Commission upheld the ALJ's denial of the Employer's motion for summary disposition.

Where an allegation of unlawful discrimination is made, the burden is on the party making the claim to demonstrate that protected conduct was the motivating factor in the respondent's decision. *MESPA v Ewart Pub Sch*, 125 Mich App 71, 74 (1982). In this case, the Union did not establish a prima facie case of discrimination as it failed to show that the Employer was motivated by anti-union animus. The evidence that the Union offered, which included statements by a school principal and by a school board member regarding privatization, could not be directly linked to the deliberations of the school board or its decision.

The Commission rejected the Union's argument that the ALJ erred by not drawing adverse inferences from the Employer's failure to have its chief negotiator testify. The Union contended that the negotiator was likely to have knowledge of facts to either refute or support Charging Party's allegation of discrimination. However, as the Commission pointed out, the Union did not specify any facts that could properly be inferred from the Employer's failure to have the negotiator testify. The Commission could not infer discrimination without facts to support that legal conclusion. Accordingly, the Commission affirmed the ALJ's Decision and Recommended Order and dismissed the unfair practice charge.

E. MERC Subject Matter Jurisdiction

1. Appellate Decisions

- a. *City of Detroit -and- Detroit Police Officers Association*,
Court of Appeals No. 296135, Order issued October 18, 2011,
affirmed MERC Case No. C07 E-110, issued January 5, 2010, 23
MPER 4 (2010).

In an unpublished opinion, the Court of Appeals affirmed MERC's decision to dismiss the unfair labor practice charges filed by appellant, Detroit Police Officers Association (Union), against the City of Detroit (Employer). The Court agreed with MERC's conclusion that it has no authority to review an Act 312 award.

The Union represents nonsupervisory police officers employed by the City of Detroit. After numerous attempts to negotiate a new collective bargaining agreement, the parties reached an impasse on the subject of healthcare plans relating to hospitalization. As a result, the issue was submitted to compulsory arbitration pursuant to Act 312 of 1969, MCL 423.231 *et seq.* The arbitration award adopted the Employer's proposal on the issue and, subsequently, the Employer began to implement the proposed policy. The Union objected to the Employer's implementation of the policy, demanded to bargain over the premiums for the health care plans, and demanded that there be an open enrollment period.

When the Employer did not comply with the Union's demands, the Union filed an unfair labor practice charge. MERC dismissed the charge, finding that the Union had not raised a claim upon which relief could be granted under PERA because the Act 312 award was not reviewable by MERC and had not been repudiated by the Employer. The Union asserted that MERC erred by failing to apply National Labor Relations Board precedent, *McClatchy Newspapers, Inc.*, 321 NLRB 1386; 153 LRRM 1137 (1996), which prohibits the post-impasse implementation of bargaining proposals unless there are objective guidelines for implementation or the union participates in the implementation process. Simply put, the Union argued that the Employer committed an unfair labor practice in its implementation of the Act 312 award because the award did not provide objective criteria for implementation and the Employer refused to bargain with the Union over implementation terms.

The Court agreed with MERC that *McClatchy Newspapers, Inc.* is not applicable and explained that the Act 312 award made this case distinguishable from the rule created in *McClatchy* because *McClatchy* involves circumstances where the parties have not reached an agreement. Here, the Act 312 award serves as the agreement of the parties and is final and binding.

Just as MERC did, the Court rejected the Union's argument that it was challenging the Employer's implementation of the Act 312 award rather than the substance of the award. The Union's argument asserted that the *McClatchy*-like violation stemmed from the absence of objective criteria for implementation, which is a criticism of the award and not a challenge to any post-award actions by the Employer. Given the Union's reasoning, the Court opined that the only way the Employer would have been able to avoid the claim that it had committed a *McClatchy*-like violation would have been to decline to implement the Act 312 award. Given the final and binding nature of Act 312 awards, that was not an

option. Finding the Union's charge was a direct attack on the substance of the Act 312 award, not an allegation of unlawful conduct by the Employer, the Court concluded that MERC did not err when it dismissed the charge.

The Court also rejected the Union's argument that the Act 312 award's failure to address the topic of premiums for the hospitalization plan made this matter subject to bargaining. The Court explained that this issue also raised a challenge to the arbitration award and the Act 312 process, which are subject to review by the circuit court and are not reviewable by MERC.

Finding no error in MERC's conclusion that the Union had not alleged facts demonstrating that the Employer repudiated the Act 312 award, the Court reiterated the standard explicated by MERC for finding a contract repudiation: "Repudiation exists when (1) the contract breach is substantial, and it has a significant impact on the bargaining unit and (2) no bona fide dispute over interpretation of the contract is involved." The Court noted that the method for making the healthcare plan available was not set forth in the Act 312 award and that there was a dispute between the parties regarding that issue. Therefore, the Court concluded that MERC did not err when it found that the Union failed to demonstrate that the Employer had repudiated the Act 312 award.

F. Good faith dispute over contract interpretation

1. Significant MERC Decisions

a. *City of Pontiac and Teamsters Local 214*

MERC Case No. C11 B-023, issued November 15, 2012

Unfair Labor Practice Not Found; Charging Party Failed to State a Claim upon which Relief can be granted under PERA; Summary Disposition Appropriate where No Material Facts are in Dispute; ALJ may Hear Argument and Dispose of Oral Motion for Summary Disposition without Prior Notice to Parties. Respondent's Duty To Bargain Over Subcontracting was Met when Parties' Agreed to Contract Language Specifying Circumstances under which Subcontracting may Occur; Since Contract Provisions Covering the Matter in Dispute could Reasonably be Relied on for the Action at Issue, Parties have a Bona Fide Dispute over Contract Interpretation. A Good Faith dispute over the Interpretation of the Collective Bargaining Agreement is not Repudiation and, therefore, must be Resolved by the Grievance Mechanism Provided in the Parties' Contract.

In its decision, the Commission affirmed the ALJ's decision on summary disposition finding that the Charging Party, Teamsters Local 214, failed to state a claim upon which relief could be granted under PERA.

The parties' collective bargaining agreement contains a provision specifying the circumstances under which the Employer may subcontract bargaining unit work. The contract also contains a provision covering layoffs.

On two occasions in the fall of 2010, Respondent's emergency financial manager, sent notice to Charging Party indicating that Respondent intended to subcontract certain services that were currently being provided by members of the bargaining unit represented

by Charging Party. Charging Party requested negotiations over Respondent's impending actions related to subcontracting of bargaining unit work and layoff of its bargaining unit members. Subsequently, the parties met on three occasions to discuss these issues.

Respondent sent layoff notices to employees in Charging Party's unit on September 10, 2010, January 18, February 3, and February 11, 2011. However, Charging Party claims that copies of these notices were not sent to it in a timely fashion as required by the collective bargaining agreement.

In its charge, the Union alleged that Respondent violated its duty to bargain under § 10(1)(e) of PERA by refusing to bargain over subcontracting and layoffs of its bargaining unit members. Following an oral motion for summary disposition, and oral argument by both parties, the ALJ summarily dismissed the charge.

On exceptions, Charging Party contended that the ALJ erred in granting Respondent's motion for summary disposition and failed to give Charging Party adequate notice that she would hear a dispositive motion at hearing. The Commission found no error by the ALJ. Commission rules provide that oral motions may be made at hearing and such motions, including motions for summary disposition, may be disposed of at hearing by the ALJ. Moreover, the Commission found the ALJ correctly concluded that there were no material facts in dispute and Respondent was entitled to prevail on the legal issues. Therefore, the Commission rejected Charging Party's contention that the ALJ should have held an evidentiary hearing.

Since the parties' collective bargaining agreement contains clauses covering subcontracting and layoffs, the parties had met their duty to bargain over those issues. Further, the Commission found that the contract provisions covering subcontracting and layoffs could reasonably be relied on for the action taken by Respondent. Therefore, the matters in dispute were covered by the parties' collective bargaining agreement. The Commission agreed with the ALJ that the parties had a bona fide dispute over contract interpretation and, therefore, rejected Charging Party's claim of contract repudiation. An alleged contract breach arising from a good faith dispute over contract interpretation is not repudiation and must be resolved through the grievance mechanisms provided for in the parties' contract. Accordingly, the Commission agreed with the ALJ that Respondent had not breached its duty to bargain and dismissed the charge.

***b. Blue Water Area Transportation Commission -and- Michigan
AFSCME Council 25 and AFSCME Local 1518,
Case No. C08 C-051, issued October 16, 2012***

Unfair Labor Practice Not Found – Dispute Over An Employer's Long-Standing Policy; Employer Terminated an Employee For Failure To have Commercial Driver's License from U.S. Department of Transportation (DOT); Employer Had No Duty to Notify Union of DOT Requirements to Pass Fitness-For-Work Test, which was a Prerequisite for a DOT Commercial Driver's License. The Matter Involved a Bona Fide Dispute Regarding Contract Interpretation

The Commission affirmed the ALJ's Decision and Recommended Order on Summary Disposition on Remand, finding that Respondent, Blue Water Area Transportation

Commission (Employer), did not violate PERA when it terminated the employment of a bargaining unit member, R, because she was unable to qualify for a U.S. Department of Transportation issued commercial driver's license (DOT card). The Commission agreed with the ALJ's finding that the Charging Party, Michigan AFSCME Council 25 (Union), failed to state a claim for which relief could be granted under PERA and that dismissal of the charge was appropriate.

The Employer had a long-standing policy that required each of their bus drivers to have a DOT card. The requirements for a DOT card are contained in Federal Motor Carrier Safety Administration (FMCSA) regulations, which include the standards for fitness-for-work physicals that drivers must pass to obtain a DOT card. Thus, as a condition of employment, all bus drivers are required to meet the standards set forth in the FMCSA regulation. R is a diabetic whose condition required her to take insulin by injection. Due to her medical condition, she was ineligible for a DOT card and was subsequently discharged by the Employer. The ALJ found that the Union's charge stated nothing more than an ordinary breach of contract and wrongful termination claim affecting only one employee.

The Union excepted to the ALJ finding that the charge asserted a mere breach of contract or wrongful termination claim. Rather, Charging Party asserted that its claim was based on the Employer's unilateral implementation or change of a work rule and, therefore, was a violation of PERA. The Union acknowledged the longstanding requirement that drivers possess a DOT card. However, the Union contended that the Employer failed to give notice of the requirement that drivers' not be dependent on insulin injections. The Commission explained that since the requirements for the FMCSA's fitness test were included in federal regulations, which were equally available to the Union and the Employer, the Employer had no obligation to inform the Union of the requirements contained in those regulations. The Commission rejected the Union's argument that the requirement that drivers not be dependent on insulin injections was a new rule. Since the requirement was incorporated in a long-standing work rule, it did not become a new work rule, in and of itself, by reason of the Union's belated discovery of it. The Commission agreed with the ALJ that the matter involved a bona fide dispute over contract interpretation, which was appropriately deferred to arbitration. Accordingly, the Commission dismissed the charge.

*c. City of Detroit (Police Department)—and—Detroit Police
Lieutenants & Sergeants Association,
MERC Case No. C10 F-132, issued August 22, 2012*

Unfair Labor Practice Not Found – Employer Did Not Repudiate Collective Bargaining Agreement when it Refused to Provide Bargaining Unit Members a Second Three Percent Wage Increase; the Matter was Grieved and Arbitrated, Thereafter the Circuit Court Issued an Order Confirming the Arbitration Award; Parties had a Bona Fide Dispute Over Whether Employer was Obligated to Pay Second Wage Increase.. Repudiation Does Not Occur where Parties have a Bona Fide Dispute Over Interpretation of the Contract

The Commission affirmed the ALJ's Decision and Recommended Order on Summary Disposition, finding that Respondent, City of Detroit (Employer), did not violate PERA by

failing to implement a wage increase, which Charging Party, Detroit Police Lieutenants and Sergeants Association (Union) contended was due pursuant to the parties' collective bargaining agreement. The Commission agreed with the ALJ's finding that Charging Party failed to state a claim for which relief could be granted under PERA and that dismissal of the charge was appropriate.

On July 1, 2008, the Employer increased wages for the Union's bargaining unit members by three percent pursuant to Article 54(B) of the parties' expired agreement. Article 54(B) established percentage differentials between the salaries of the Union's bargaining unit members and the salaries of police officers represented by the Detroit Police Officers Association (DPOA). On December 15, 2008, an Act 312 award was issued and included a provision, Article 54(A), which gave the bargaining unit members a wage increase of three percent effective July 1, 2008. Additionally, Article 54(B), which provided percentage differentials between the salaries of the Union's bargaining unit members and the DPOA salaries, was not changed by the Act 312 award.

The parties disputed whether the July 1, 2008 increase paid to the Union's members, to maintain the contractual differentials, also satisfied the July 1, 2008 salary increase called for by the Act 312 award. The Union alleged that their members were due two three percent wage increases. The Employer disagreed and refused to pay a second increase. Following the Employer's refusal, the Union instituted grievance proceedings and later filed a circuit court complaint for enforcement of the grievance arbitration award. The Union subsequently filed an unfair labor practice charge alleging that the Employer unlawfully repudiated the parties' agreement. The civil suit resulted in the matter being remanded back to the arbitrator who later issued an opinion rejecting the Union's argument that its members were entitled to two three percent wage increases on July 1, 2008. On review, the circuit court issued an order confirming the arbitrator's findings.

The issue before the Commission was whether there was a bona fide dispute over interpretation of the parties' contract. The Commission, explained that repudiation exists only when both the following occur: "(1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved." Here, the Commission found that there was a bona fide dispute over the parties' interpretation of the contract. Additionally, the Commission held that review of Act 312 arbitration awards is not within its jurisdiction. Thus, in finding that the parties had a bona fide dispute over certain provisions of the contract, the Commission found that the Employer did not repudiate its contract with the Union and did not violate PERA.

d. City of Detroit -and- AFSCME Council 25, Local 542
Case No. C09 L-241, issued April 20, 2012

Unfair Labor Practice Not Found; Allegations Failed to State A Valid PERA Claim; No Bargaining Violation Found Where Parties Reached a Verbal Agreement on a Change to a Mandatory Subject of Bargaining Which Was Codified in a Written Letter to the Union. Respondent Employer's Exception Denied; Footnote Referenced by ALJ Not Material to Outcome of Case.

The Commission affirmed the ALJ's decision dismissing the charge filed by Charging Party AFSCME Council 25, Local 542 (Union) alleging a bargaining violation by

Respondent, City of Detroit (City or Employer) for unilaterally changing a mandatory subject of bargaining.

Charging Party represents a bargaining unit of nonsupervisory building maintenance employees of the City of Detroit. As part of an ongoing reorganization, the Employer shifted various building maintenance functions to a general services department. The transfer to the general services department involved changing employee assignments from work at stationary locations to roving work crews. The Employer met with Charging Party's representatives to discuss the new roving work crew plan that would also result in additional work assignments and overtime hours for several of Charging Party's bargaining units. At Charging Party's request, an additional component was included in the Employer's initial plan. Weeks later, the parties met again to allow the Union's stewards and individual members to bid on their new assignments under the roving work crew plan. During this same timeline, the Employer canceled its contracts with the outside cleaning vendors to ensure that Charging Party's members would be exclusively performing the work under the new plan.

As the implementation date grew closer, one of Charging Party's affiliated locals objected to the roving work crew plan but did not provide any specifics as to its objection. After the Employer implemented the roving crew operation, Charging Party filed a charge claiming that a bargaining violation occurred and that the plan sought to frustrate the members' access to their union stewards. The ALJ rejected these contentions finding that the Union had agreed to the changes during the special meeting that was documented in a letter from the Employer.

On exceptions, MERC affirmed the ALJ's conclusions and dismissed the charge against the Employer. Like the ALJ, MERC concluded that the parties had bargained on the change to roving crews as demonstrated by: the Union's success in adding a component to the Employer's initial plan; the Union's members meeting to select new work assignments; and the Employer canceling its outside cleaning contracts in order to provide the increased work activity and overtime hours to Charging Party's members.

MERC dismissed the Employer's exception that sought to strike a footnote regarding the untimeliness of its post hearing brief. MERC reasoned that notwithstanding the dispute on the timeliness of the brief, the ALJ considered it in reaching his conclusions. As such, any MERC action on the footnote is not material to the outcome of the case.

G. Direct Dealing

a. *West Bloomfield Township –and- Police Officers Association of Michigan (POAM)*

Case No. C08 L-265, issued April 17, 2012

Unfair Labor Practice Not Found, Respondent did not Engage in Direct Dealing by Inquiring Into a Bargaining Unit Member's Interest in a Non-Union Position in Exchange for Removing His Name From the Promotion List; Mere Discussions Between an Employer and Employee to Ascertain that Employee's Interest in a Non-Union Position Do Not Constitute a Direct Dealing Violation Under PERA Where There Has Been No Change in the Terms and Conditions of Employment and the Union's Authority Has Not Been Undermined.

The Commission agreed with the ALJ's finding that West Bloomfield Township (Employer) did not commit an unfair labor practice by directly contacting a bargaining unit member to inquire into his interest in moving into a vacant lateral position in the detective bureau. The ALJ and Commission reasoned that the Employer's actions did not change the existing conditions of employment and did not undermine the Union.

The Police Officers Association of Michigan (POAM or Union) represents a group of non-supervisory police officers working for the Employer. The Employer established a promotional list to fill future sergeant vacancies that contained the names of several bargaining unit members. Pursuant to the parties' collective bargaining agreement, the Employer maintained complete discretion to promote from within the top three candidates on the list notwithstanding the officer's actual rank order in that top cluster. After being overlooked for three sergeant's openings while in that top cluster, a unit member was approached by a group of command officers who inquired into his interest in a lateral assignment outside of the bargaining unit. In exchange for accepting the new position, the officer would be required to voluntarily remove his name from the promotional list for sergeant. Believing the transfer offer was an effort to select a candidate below the top cluster of the list, the officer declined taking the lateral position and contacted the Union. The Union filed an unfair labor practice charge alleging the Employer's discussion with the unit member was an attempt to circumvent the promotional process of the collective bargaining agreement. The ALJ rejected the Union's theory finding instead that a direct dealing violation had not occurred in light of the broad discretionary authority given to the Employer on promotional matters. The Commission also agreed with the ALJ's reasoning that the Employer operated within the parameters of the parties' contractual terms and its mere discussions with a bargaining unit member to ascertain his career interests did not constitute a PERA violation, especially where the discussions did not result in a change in the terms and conditions of employment, nor undermine the Union's authority.

II. Bargaining Unit Composition Issues Related To Act 312 Eligibility

a. Michigan State University (Police Department) -and- Capitol City Lodge No. 141, Fraternal Order of Police, Case No. UC12 A-001, issued February 27, 2013

Unit Clarification Petition and Compulsory Arbitration Petition Dismissed; Act 312 does not apply to Police Officers Employed by a Public University; Recent Amendment to Act 312 Extended Coverage to Authorities Created by One or More Municipalities. University Police Department was Not Created by a Municipality

The Commission dismissed the petition for unit clarification and petition for binding arbitration under Act 312 filed by the Fraternal Order of Police, Capitol City Lodge No. 141 (Petitioner) which sought to apply Act 312 compulsory arbitration to police officers employed by Michigan State University (Employer). The Commission concluded that Act 312, as amended, does not apply to police officers employed by a public university.

Petitioner contended that recent amendments to Act 312, 2011 PA 116, expanded the coverage of the Act to include police officers employed by colleges and universities. The Employer asserted that the 2011 amendments could not be construed as applying to police officers employed by a public university.

Section 1 of Act 312 specifies that employees of public police and fire departments are eligible for compulsory arbitration. Prior to 2011, Act 312 defined such departments as a department of a city, county, village, or township. Consequently, in *Ypsilanti Police Officers Ass'n v Eastern Michigan Univ*, 62 Mich App 87 (1975), the Court of Appeals held that police officers employed by Eastern Michigan University were not eligible for compulsory arbitration under Act 312.

The Commission found that the 2011 amendments to Act 312 did not expand the scope of coverage beyond police and fire departments created by municipalities. Rather, Section 2(1) of the Act was amended to ensure that employees of an authority created by one or more municipalities were eligible for compulsory arbitration. Given the absence of any evidence suggesting that the MSU Police Department was an authority created by one or more municipalities, the Commission dismissed the petitions. The Commission dismissed the petition for unit clarification and petition for binding arbitration under Act 312 filed by the Fraternal Order of Police, Capitol City Lodge No. 141 (Petitioner) which sought to apply Act 312 compulsory arbitration to police officers employed by Michigan State University (Employer). The Commission concluded that Act 312, as amended, does not apply to police officers employed by a public university.

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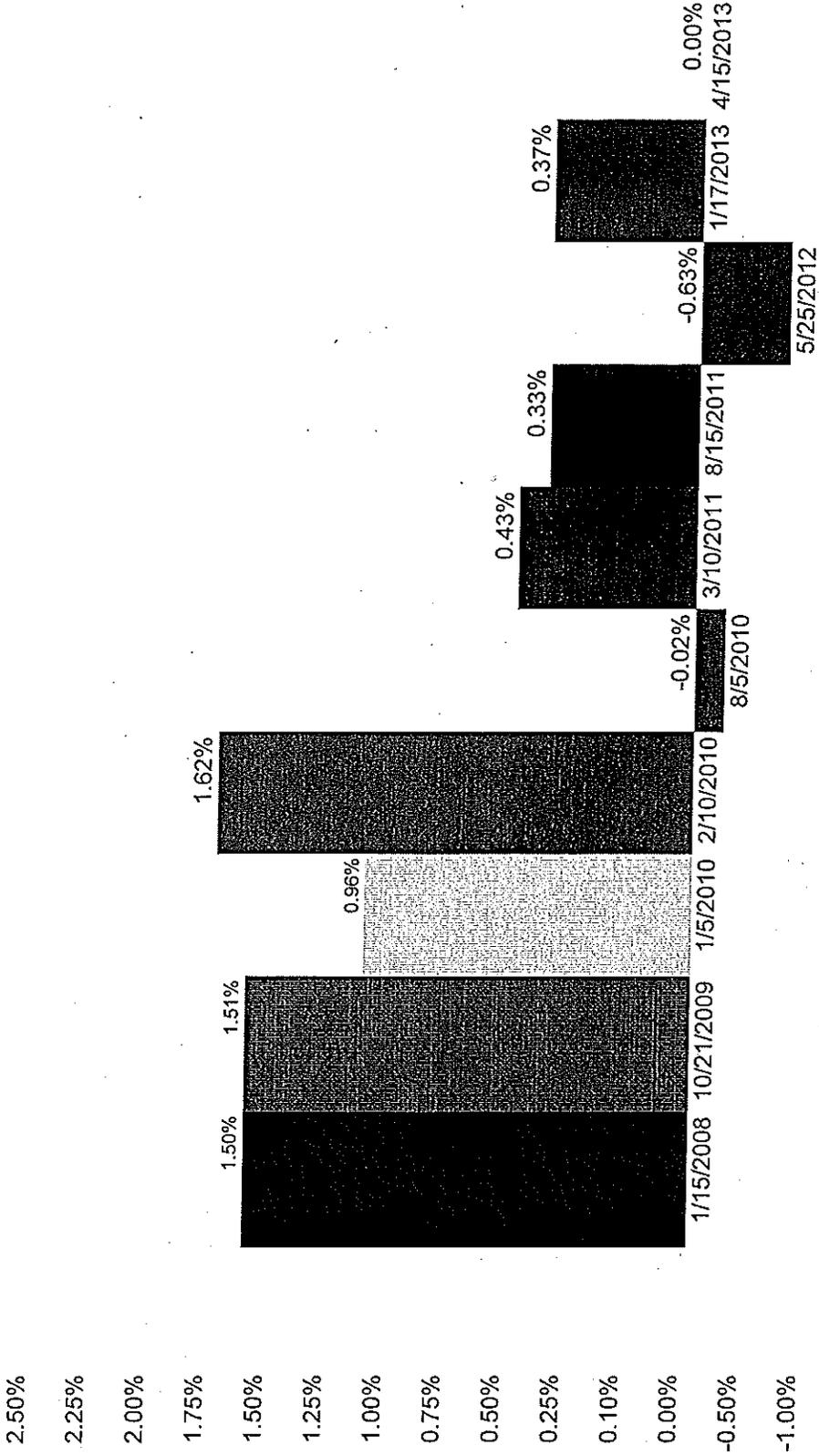
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GENERAL COMPUTATIONS OF FACT FINDING
SYNOPSIS/OBSERVATIONS

WAGES

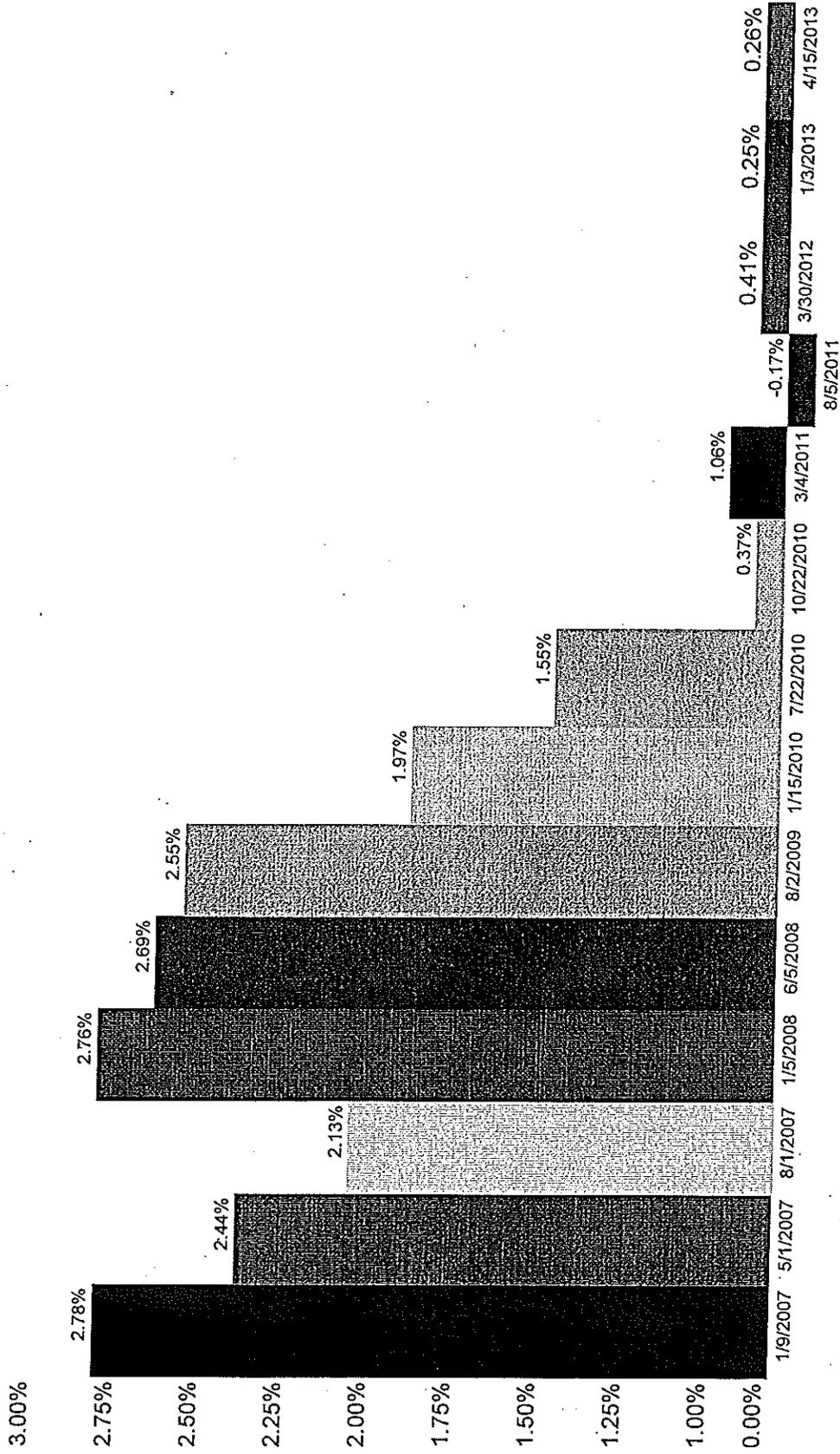
AVERAGE WAGE RECOMMENDED PER CONTRACT YEAR



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GENERAL COMPUTATIONS OF ACT 312 SYNOPSIS/OBSERVATIONS
WAGES

AVERAGE WAGE AWARD I PER CONTRACT YEAR



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