STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURLEY MEDICAL CENTER,
Public Employer-Respondent,

MERC Case No. C16 D-042

-and-

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 459,
Labor Organization-Charging Party.
____/

APPEARANCES:

The Williams Firm, P.C., by Kendall B. Williams and Chelsea S. Down, and Hall, Render, Killian, Heath & Lyman PLLC, by Bruce M. Bagdady and Bradley M. Taormina, for Respondent

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

DECISION AND ORDER

On August 2, 2017, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondent Hurley Medical Center (HMC) violated § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, when it unilaterally ceased to provide performance wage increases to certain employees after the Union became certified as their exclusive representative. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order and a request for oral argument on August 25, 2017. Charging Party filed its brief in support of the ALJ's Decision and Recommended Order on September 5, 2017.

In its exceptions, Respondent contends that 1) its practice of conducting performance evaluations and granting wage increases based on those evaluations was not an established practice regularly expected by its employees, 2) it fulfilled its bargaining obligation by continuing to bargain with the union regarding all terms and conditions of employment, including wages, and 3) the recommended order and remedy are not warranted.

[1] MAHS Hearing Docket No. 16-012236

In its brief in support, Charging Party contends that the ALJ's findings were based on applicable law and should be affirmed.

Although Respondent has requested oral argument in this matter, we find that oral argument would not materially assist us in deciding this case, and therefore, deny the request.

We have reviewed the exceptions filed by Respondent, and find that they have merit.

Factual Summary:

Respondent HMC is a Level 1 Trauma Center located in Flint, Michigan with approximately 3,000 employees. The Hospital is part of the City of Flint, a municipal corporation. Prior to 2014, nine bargaining units represented HMC employees.

In 2013, HMC implemented its Salary Administration Plan (Plan) to formally address annual compensation for non-bargaining unit employees, such as Physician Assistants (PAs) and Nurse Practitioners (NPs). According to the record, non-bargaining unit employees had not received a raise for some time prior to the implementation of the Plan and "were starting to get a little upset."

Under the Plan, any non-bargaining unit employee hired prior to the beginning of a current performance evaluation period is eligible for participation in the Plan provided that he or she has received a satisfactory or better performance evaluation rating. The amount each eligible employee receives under the program is dependent upon: (1) how much HMC budgets for performance increases for the fiscal year; (2) the individual employee's performance evaluation score; and (3) the employee's position within his or her salary range. Section 8 of the Plan's Policy and Procedure Manual notes that "HMC may amend or discontinue this Program at any time, at the sole discretion of the CEO."

For the 2013 fiscal year (July 1, 2012 through June 30, 2013) HMC budgeted an amount equal to one percent of non-bargaining unit salaries for increases under the Plan. Performance evaluations were completed on a paper form covering the period July 1, 2012 through June 30, 2013 with the same criteria used for every employee. The performance increase granted under the Plan was effective on October 1, 2013.

For the 2014 fiscal year (July 1, 2013 to June 30, 2014), HMC budgeted an amount equal to two percent of all non-bargaining unit salaries for increases under the Plan. The performance evaluation tool and/or form used in 2014, however, was electronic and substantially different from that used in 2013. Although the performance increase was scheduled to go into effect on October 1, 2014, evaluations were not actually completed until the end of September as a result of the change in the performance evaluation tool. Consequently, HMC changed the effective date of salary increases under the Plan from October 1 to the first full pay period in November. Additionally, rather than pay employees retroactively, the Hospital paid the increase for the 12-month period over the following 11 months.

On October 7, 2014, Charging Party OPEIU Local 459 (Local 459 or Union) was certified as the exclusive bargaining representative of Physician Assistants (PAs) and Nurse

Practitioners (NPs) employed by HMC. Although Charging Party was certified as the exclusive bargaining representative for the PAs and NPs on October 7, before the Plan increases went into effect, eligible employees in those positions received performance increases for that fiscal year in November.

HMC and Local 459 began negotiations for their first labor contract in January 2015. As of October 2016, the parties had met over 30 times and exchanged economic and non-economic proposals.

For the 2015 fiscal year (July 1, 2014 to June 30, 2015), HMC set aside an amount equal to three percent of non-bargaining unit salaries to be used for increases under the Plan. The evaluation period for that year covered the period of October 1, 2014, to September 30, 2015, and eligible employees received performance increases under the program beginning the first full pay period of November 2015. PAs and NPs employed by the Hospital, however, were not awarded performance increases.

On November 23 and 30, 2015, Local 459 Business Representative Jeff Fleming asked Respondent whether union members would receive increases in 2015 under the Plan. HMC's attorney, Kendall Williams, responded that due to the discretionary nature of the Plan and the fact that the program could be amended or discontinued at any time at the sole discretion of the CEO, the Hospital was obligated to negotiate with the Union about such increases. Williams continued, "Were Hurley Medical Center to make these discretionary increases without bargaining, it would violate its obligation to bargain with Local 459 about terms and conditions for its members." In support of his contentions, Mr. Williams cited *NLRB v Katz,* 369 US 736 (1962); *Munson Medical Center,* 1971 MERC Lab Op 932; *Mid-Michigan Cmty College,* 1988 MERC Lab Op 471; and *Michigan Technological University*, 20 MPER 36 (2007).

In an email response to Williams dated December 30, 2015, Fleming argued that the performance increase is "more akin to a step increase than a discretionary pay raise" and that "bands and scores at Hurley are conditions of employment although the size of the percentage increase may not be." Fleming also offered to waive the Union's right "to bargain over the 2015 percentage performance increases for that year only on a non-precedent setting basis." However, Fleming indicated that the Union reserved is right to negotiate over future performance increases. Fleming requested that the Hospital provide a response to his proposal no later than January 11, 2016, and threatened to take "appropriate legal action" if an acceptable response was not received by that deadline.

On January 19, 2016, representatives of HMC and Local 459 convened for a bargaining session during which Respondent sought clarification from the Union of its offer to waive its right to bargain regarding the performance increase which went into effect in November of 2015. Fleming explained that the Union's proposal was for a very limited waiver, and only covered the November 2015 increases. In response, HMC indicated that it would address Charging Party's "economic proposal" within the scope of collective bargaining and that the Hospital would not pay any performance increase to the members of Local 459 for the 2015 fiscal year.

The Union filed the instant charge on April 26, 2016 alleging that HMC refused to bargain in good faith when it engaged in the following conduct: (1) refused to bargain over a change in working conditions in the Trauma Department; (2) refused to bargain regarding performance/merit increases; (3) refused to bargain over educational memos; (4) failed to provide information; and (5) unilaterally changed prescription costs. Respondent filed an answer to the charge on June 17, 2016.

An evidentiary hearing was scheduled for June 20, 2016. On that date, the Union and HMC resolved all of the issues set forth in the charge with the exception of the performance/merit increases issue. With respect to that issue, the parties agreed to file stipulated facts and briefs in lieu of an evidentiary hearing. On October 10, 2016, the parties jointly submitted a stipulation of facts, along with thirteen joint exhibits. Local 459 and HMC each filed briefs on or before October 24, 2016. With the permission of the ALJ, HMC filed a reply to the Union's brief on December 5, 2016.

After reviewing the stipulation of facts and briefs, the ALJ believed that there remained several unresolved questions of fact that had not been adequately addressed within the stipulation of facts. Following several telephone conference calls, it was agreed that there would be a limited evidentiary hearing to further develop the factual record in this matter. The evidentiary hearing was held in Detroit, Michigan on March 1, 2017. During the hearing, a single witness, Beth Brophy, Respondent's Senior Finance Administrator for Special Projects, testified on behalf of the Hospital. Thereafter, both parties filed supplemental briefs on or before April 10, 2017.

Discussion and Conclusions of Law:

Under both PERA and the National Labor Relations Act (NLRA), 29 USC 150 et seq., the federal statute upon which PERA is modeled, an employer has the obligation to bargain with the representative selected by a majority of its employees for purposes of collective bargaining with respect to wages and wage-related issues, as well as other conditions of employment. The amount of any salary increase and whether the money is to be distributed across-the-board or by merit are subjects upon which an employer is required to bargain. An employer's unilateral implementation of a wage increase while it is engaged in bargaining a contract with the union is a violation of its duty to bargain in good faith, even though the employer may be attempting in good faith to reach a contract. *NLRB v Katz*, 369 US 736 (1962). In *Katz*, the Employer, without notice to the union, granted merit increases to 20 employees out of approximately 50 in the bargaining unit. In determining that the Employer violated its duty to bargain by granting the merit increases, the Supreme Court held that an employer violated its duty to bargain by implementing merit increases during negotiations for a first contract, even though the employer had a longstanding practice of granting quarterly or semi-annual merit reviews, since the "increases were in no sense automatic, but involved a large measure of discretion." *Katz*, at 746.

In *Munson Medical Center,* 1971 MERC Lab Op 932, the Commission applied the Supreme Court's decision in *Katz* and found that the employer, after certification of the union, violated its bargaining duty by unilaterally granting a wage increase to employees where its

existing policy with respect to periodic wage increases was discretionary as to time and amount. Although the employer argued that the wage increases were made pursuant to a two year plan, the Commission found that the timing of the annual wage increase was not only discretionary with the employer as to the period in which it was to be given, but discretionary as to the amounts.

In *Mid-Michigan Cmty College,* 1988 MERC Lab Op 471, the college had an established practice of providing an annual wage increase to its hourly employees on July 1 of each year. The wage increase had two elements: an overall wage adjustment, and a step increment based on years of service. Following certification of a bargaining representative for support personnel in June of 1986, representatives of the college announced that a wage increase would be a negotiable item. The union maintained that the granting of a yearly wage increase was a long-established practice of the college and that it was, therefore, a violation of the employer's bargaining obligation to fail to grant a wage adjustment effective July 1, 1986. The administrative law judge in *Mid-Michigan Cmty College*, following the *Munson Medical Center* case, found that, as there was no ascertainable, scheduled, or set wage increase due hourly rated employees on July 1, 1986, the employer could not unilaterally grant a wage increase without violating its bargaining obligation under PERA. The Commission agreed with the ALJ and noted "that there was no pattern or practice of giving a set percentage across-the-board increase, and thus the across-the-board increases did not become a condition of employment." *Mid-Michigan Cmty College*, at 475. However, it also found that the ten year practice of giving step increases for additional years of service did constitute a condition of employment and concluded that, by its failure to advance bargaining unit employees to the next step in the salary grid, the employer unilaterally altered terms and conditions of employment.

In *Detroit Public Library*, 1997 MERC Lab Op 689 (no exceptions), the employer refused to honor a wage increase promised to a group of skilled trades employees. The promise of a 2% wage increase effective July 1996 was made prior to a representation election at which the UAW was selected as bargaining representative for the employees. The ALJ concluded that the 2% wage package promised by the library was a condition of employment which continued after certification of the UAW and that the withholding of this increase constituted a unilateral change in the terms and conditions of employment in violation of § 10(1)(e) of PERA. The ALJ noted that the issue in the case did not involve a possible or expected increase, but one that was announced and scheduled.

In *Michigan Technological University*, 20 MPER 36 (no exceptions) (2007), a union was certified as the collective bargaining agent for a unit of teaching faculty employed by Michigan Technological University in October 2004. The union subsequently filed an unfair labor practice charge against the employer asserting that, on or about June 25, 2005, the employer unilaterally announced, and then implemented, merit-based salary increases for members of the union's bargaining unit while the parties were engaged in bargaining their first collective bargaining agreement. The union alleged that these salary increases constituted a unilateral change in wages and violated the Employer's duty to bargain in good faith under § 10(1)(a) and (e) of PERA. The employer maintained that annual merit-based salary increases had become an existing condition

of employment for faculty and that it was allowed and obligated to maintain the status quo during bargaining. The ALJ found that, while the University had an established ten-year practice of granting merit wage increases to its faculty each summer, the size of the salary pool, and the percentages allocated to merit pay, market/equity pay, and promotional increases were not established terms of employment constituting "part of the established compensation system." The ALJ concluded that, after the union was certified it had the right, and the University had the obligation, to bargain over all aspects of the University's 2005 salary increases which were not controlled by past practice. This included the size of the salary pool. On this basis, the ALJ held that the employer's unilateral implementation of merit-based salary increases violated its duty to bargain in good faith with the union.

In the present case, HMC granted performance/merit increases for two fiscal years, a 13 month period. As in *Mid-Michigan Cmty College*, 1988 MERC Lab Op 471, and unlike *Detroit Public Library*, 1997 MERC Lab Op 689 (no exceptions), no set wage increase was due employees. To the contrary, as in *Michigan Technological University*, the size of the salary pool was discretionary. The percentage of salaries set aside for performance increases actually doubled from 1% in 2013 to 2% in 2014 and increased even more in subsequent years.[2] Consequently, as in *Michigan Technological University*, the amount budgeted for wage increases was not a condition of employment. Significantly, a review of Local 459 Business Representative Fleming's email to Attorney Williams dated December 30, 2015, establishes that the Union itself did not believe that the size of the percentage increase was a condition of employment.

Additionally, under the Plan, some employees received no increases in pay while others received 2.5% increases. Of those employees who received no wage increase, some received a lump sum increase and others received nothing. The performance evaluation tools were also different in each year. In 2013, PAs and RNs were evaluated on the basis of very broad criterion such as job knowledge, communication, and customer satisfaction. In 2014, the performance evaluation tool was changed to measure certain job specific competencies such as "reviews diagnostic information and institutes patient dispositions with supervising physician." Furthermore, the timing of the wage increase was also discretionary: the first increase was paid on October 1, 2013 and the second in November 2014. Consequently, the performance increases provided for by the Plan "were in no sense automatic, but were informed by a large measure of discretion." See *Katz*, at 746. Inasmuch as the Employer and Union were not at impasse and had not reached an agreement, the Employer could not implement the Plan without violating its bargaining obligation under PERA.[3] *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 61-63 (1974).

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[2] The percentage of non-bargaining unit salaries set aside for performance increases in 2015 was 3% and was 3 ½ % in 2016.

[3] There is no dispute that the Employer, in this case, did engage in good faith bargaining over wages and other terms and conditions of employment, including the 2015 and 2016 performance increases.

Admittedly, in support of his decision, the ALJ relied on certain decisions of the National Labor Relations Board (NLRB) involving the National Labor Relations Act (NLRA).[4] While federal precedent under the NLRA is often given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA, MERC is not bound to follow "every turn and twist" of NLRB case law. *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co Health Dep't*, 1993 MERC Lab Op 901, 906. This is especially true where NLRB precedent conflicts with that of the Commission or other NLRB precedent. See *Kent County*, 21 MPER 61, 221 (2008); *Seventeenth District Court (Redford Twp)*,19 MPER 88 (2006); and *Michigan Technological Univ*, (no exceptions). See also Footnote 4 below.

In this case, we find persuasive the longstanding Commission precedent discussed above and continue to hold that where wage increases in the past have been "discretionary," i.e., not governed by any practice or pattern as to timing or amount, an employer is not required or allowed to give a wage increase without bargaining with the union. *Mid-Michigan Cmty College,* at 475. Consequently, we agree with Respondent that it was not obligated to implement the discretionary performance increases provided for by the Plan in 2015 or 2016.

Applying NLRB Precedent

The above notwithstanding, even if one were to apply NLRB precedent, we conclude that the instant charge would lack merit. According to the ALJ, in determining whether merit increases are part of the employees' existing wage structure, the NLRB finds the following factors to be relevant: (1) whether the increases are based on a fixed criterion of merit; (2) whether the timing of the increase is fixed; (3) whether the amount of the increase, although discretionary, falls within a narrow range; (4) whether the majority of eligible employees receive the increase; and (5) whether the increase has been granted over a significant period of time.[5]

(1) Whether the increases are based on a fixed criterion of merit

There was not a sole, fixed criterion for granting a merit increase. Senior Finance Administrator Beth Brophy testified at length regarding the discretionary nature of performance increases under the Plan.[6] According to Ms. Brophy, she starts to prepare the budget for each fiscal year in February. The amount budgeted for merit increases is influenced by the hospital's operating margin as well as bond covenants the hospital needs to meet. Ms. Brophy recommends to the CEO an amount to be budgeted for merit increases and this is presented to the Board of Hospital Managers in May. The amount budgeted has changed each year and is

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[4] It is interesting to contrast the decisions relied upon by the ALJ with *Anaconda Ericsson, Inc,* 261 NLRB 831 (1982), in which the Board held that an employer could unilaterally withhold wage increases that had been granted annually for the prior five years but which were discretionary as to amount. *Id.* at 834. See also *American Mirror Co*, 269 NLRB 1091, 1094-1095 (1984), *Specialty Steel Treating, Inc.,* 279 NLRB 670 (1986) *Orval Kent Food Co.,* 278 NLRB. 402 (1986), *Ithaca Journal–News, Inc.,* 259 NLRB 394 (1981), and *Oneita Knitting Mills*, 205 NLRB 500, 503 (1973).

[5] Under the Board precedent cited by the ALJ, a Charging Party must establish each of the factors in order to prove that merit increases have become a condition of employment. *Dynatron/Bondo Corp*, 323 NLRB 1263, 1264 (1997).

[6] Ms. Brophy was the only witness to testify at the March 1, 2017 hearing.

subject to revision after the Board's approval. Additionally, as noted above, the percentage of salaries set aside for performance increases has varied substantially during the time period relevant to this dispute.

With respect to the actual evaluation of employees, Ms. Brophy testified that the performance evaluation tool used in 2013 was the same for all employees. For the 2014 performance increases, HMC developed a new electronic evaluation tool that was more job-specific. The performance evaluation forms/tools were not identical or "fixed." Once the performance evaluations are completed by managers, Ms. Brophy works with Human Resource Representative Summer Jenkins to develop a performance increase matrix, a document that is used to determine an individual employee's actual performance increase. Using the performance evaluation scores, the amount budgeted for merit increases, the salary bands and their own independent judgment, Ms. Brophy and Ms. Jenkins use a trial and error process to determine the amount to be awarded an employee. As a result of the nature of the process, it is not possible for an individual employee to determine his or her performance increase before the performance matrix for that year is completed.

(2) Whether the timing of the increase is fixed

The timing of the increases was not fixed and actually varied from year to year. In the first fiscal year, the performance increase was granted on October 1 and, in the second fiscal year, in early November. Nonetheless, both increases were in the fall.

(3) Whether the amount of the increase, although discretionary, falls within a narrow range

The amount of the raises did not fall within a narrow range. There was sufficient variance such that all employees did not effectively receive the same wage increase from year to year or within a year. The performance/merit increases were not "across-the-board" wage increases by another name.

(4) Whether the majority of eligible employees receive the increase

The majority of eligible employees did receive the increase.

(5) Whether the increase has been granted over a significant period of time

The increases were granted over a 13 month period, a much shorter period than the four year period involved in *United Rentals, Inc*, 349 NLRB 853 (2007), the six year period involved in *Dynatron/Bondo Corp*, 323 NLRB 1263 (1997), the seven year period involved in *Tampa Electric Co*, 364 NLRB No. 124 (2016), the 3 ½ year period involved in *Daily News of Los Angeles*, 315 NLRB 1236 (1994) and the six year period involved in *Central Maine Morning Sentinel*, 295 NLRB 376 (1989). The 13 month period over which the increases were granted in the present case is not sufficient to establish a condition of employment under Board law.

Additionally, unlike many of the Board cases cited by the ALJ, the Employer in the instant case did engage in good faith bargaining over wages and other terms and conditions of

employment. HMC and Local 459 began negotiations for their first labor contract in January 2015. As of October 2016, the parties had met over 30 times and exchanged economic and non-economic proposals. The parties have negotiated regarding the pay scale, wage increases and other economic issues, and the Union has demanded retroactive wage increases covering the time period involved in this dispute. Additionally, according to Ms. Brophy, HMC bargained with the Union regarding the 2015 and 2016 performance increases. In the present case, HMC did not discontinue the Plan itself or refuse to bargain with the Union over the Plan.

Consequently, even if one were to apply the NLRB precedent relied upon by the ALJ, the Plan did not become a condition of employment which the Employer was obligated to implement subsequent to the Union's certification to avoid violating the status quo.

The Commission, therefore, finds that the ALJ erred by concluding that Respondent violated § 10(1)(e) of the Public Employment Relations Act by unilaterally discontinuing to provide performance wage increases after the Union became certified as their exclusive representative.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: February 14, 2018

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

HURLEY MEDICAL CENTER,
Respondent-Public Employer,

Case No. C16 D-042
-and- Docket No. 16-012236-MERC

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 459,
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APPEARANCES:

The Williams Firm, P.C., by Kendall B. Williams and Chelsea Down, and Hall, Render Kilian, Heath & Lyman, by Bruce M. Bagdady and Bradley M. Taormina, for Respondent

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

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Office and Professional Employees International Union, Local 459 (OPEIU) against Hurley Medical Center (HMC or "the Hospital"). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission).

The Unfair Labor Practice Charge and Procedural History:

The unfair labor practice charge, which was filed on April 27, 2016, alleges that Hurley Medical Center committed the following violations of Section 10(1)(e) of PERA during negotiations on the parties' first contract following the OPEIU's certification as bargaining representative: (1) refusing to bargain over a change in terms and conditions of employment for bargaining unit members employed in the Hospital's Trauma Department; (2) refusing to bargain over whether performance increases should continue to be granted to bargaining unit members;

(3) refusing to bargain over the issuance of counseling memos; (4) failing to provide information requested by the OPEIU; and (5) unilaterally changing prescription drug costs. Respondent filed an answer to the charge on June 17, 2016.

An evidentiary hearing was scheduled for June 20, 2016. On that date, the OPEIU and HMC resolved all of the issues set forth in the charge with the exception of the Union's assertion that Respondent unlawfully refused to bargain over whether Charging Party's members were entitled to performance increases during negotiations on a first collective bargaining agreement. With respect to that issue, the parties agreed to the filing of stipulated facts and briefs in lieu of a an evidentiary hearing. On October 10, 2016, the parties jointly submitted a stipulation of facts, along with thirteen joint exhibits. The OPEIU and HMC each filed briefs on or before October 24, 2016. With the permission of the undersigned, HMC filed a reply to the Union's brief on December 5, 2016.

After reviewing the stipulation of facts and briefs, I determined that there remained several unresolved questions of fact which had not been adequately addressed within the stipulation. Following several telephone conference calls, it was agreed that there would be a limited evidentiary hearing to further develop the factual record in this matter. The evidentiary hearing was held in Detroit, Michigan on March 1, 2017, during which a single witness, Beth Brophy, Respondent's Senior Finance Administrator for Special Projects, testified on behalf of the Hospital. Thereafter, both parties filed supplemental briefs on or before April 10, 2017.

Facts:

I. Background

The following facts are derived from the stipulation of facts, the transcript of hearing, and exhibits agreed to by the parties. HMC is a Level 1 Trauma Center located in Flint, Michigan with approximately 3,000 employees. The Hospital is part of the City of Flint, a municipal corporation. There are ten bargaining units which represent HMC employees. Physician Assistants (PAs) and Nurse Practitioners (NPs) employed by HMC were not part of any bargaining unit until Charging Party OPEIU Local 459 was certified as the exclusive bargaining representative of those positions on October 7, 2014. HMC and Local 459 have not reached agreement on a first contract. As of the date of the hearing in this matter, there had been over 30 negotiation sessions during which the parties exchanged numerous proposals and reached tentative agreements on several non-economic issues.

II. Creation of the Salary Administration Plan

Prior to the events giving rise to the instant dispute, HMC did not have a formal performance incentive program in place for employees working in non-bargaining unit positions. Some non-unit employees, including PAs and NPs, were eligible for step increases based upon length of service or, in the case of higher level employees such as managers, directors and administrators, merit increases. On occasion, Respondent would give across-the-board salary increases to all of its non-bargaining unit employees regardless of their individual step or merit increase levels.

Performance evaluations were not taken into consideration with respect to any of these salary increases.

In 2011, Beth Brophy was employed by HMC as Vice President of Human Resources. Sometime that year, Brophy recommended to Respondent's CEO that the Hospital implement a program to formally address annual compensation for non-bargaining unit employees. Respondent issued a Request for Proposal (RFP) and contracted with an outside consultant to assist with the program's creation. HMC and the consultant drafted a document entitled "Compensation Philosophy Statement" (CPS) to serve as the foundation for development of the new program. According to that document, the overriding goal of the philosophy was to enable the Hospital to establish an overall compensation package that serves to attract, recognize, reward and retain qualified talent. The CPS specified that the program was to be governed and administered on the basis of merit, qualifications and competence and that it would have "the flexibility to respond to changing conditions such as market demands, organizational structure, and human capital needs." HMC pledged that it would remain committed to the philosophy set forth within the CPS "to the extent that it has the financial resources to fund its compensation programs."

The new program, which became known as the Salary Administration Plan (SAP), was implemented in 2013. In March of that year, HMC promulgated a manual setting forth the specific details of the program for the purpose of assisting management in understanding and utilizing the SAP. The manual, which was revised in September of 2014, states that the SAP applies to "all regular full and part-time non-bargaining unit employees of HMC and its departments, with the exception of Board appointed executives" and that the program "takes the place of prior policies and procedures on compensation." According to the manual, the Hospital's Chief Executive Officer (CEO) is responsible for approving any changes to the program "consistent with HMC's mission, vision and business plan" and any "salary actions" including those that are outside of the SAP's guidelines. At the same time, Respondent's Human Resources Department is responsible for administration of the program and for "monitoring its utilization and effectiveness." This includes the authority to conduct periodic reviews of the program and responsibility for reviewing "all recommendations for salary actions and for submitting them to the CEO for approval." In addition, Human Resources is charged with "implementing and monitoring salary changes to ensure the Program's consistent application and operation throughout the Hospital." Brophy testified that the Hospital has the authority to discontinue the SAP, but if it did so, it would have to find a different compensation plan with which to replace it.

At hearing, Brophy testified regarding how the SAP operates and is administered. Any non-bargaining unit employee hired prior to the beginning of the current performance evaluation period is eligible for participation in the SAP provided that he or she has received a satisfactory or better performance evaluation rating. As set forth in greater detail below, the amount each eligible employee is to receive under the program is dependent on: (1) how much Respondent budgets for performance increases for that fiscal year; (2) the individual employee's performance evaluation score; and (3) the employee's position within his or her salary range, which is based upon the individual's pay grade, hourly salary and the average salary of similar positions within the market.

III. The Budget

The Hospital's fiscal year runs from July 1 to June 30. Brophy begins to prepare the budget for the upcoming year in February. She recommends an amount to be budgeted for non-bargaining unit performance increases to the CEO and includes that figure in the line item for total salaries on the budget that is presented to HMC's Board. This recommendation is based on the Hospital's projected bottom line and whether a given performance increase will allow HMC to meet its operating margin. The Hospital's operating margin was three percent in 2013 and had increased to four percent at the time of the hearing in this matter. Brophy shares her recommendation regarding performance increases with the CEO, the Chief Financial Officer (CFO) and an individual in the Human Resources Department, but the amount is not made public and the Hospital is under no obligation to abide by Brophy's initial determination. The line item budget is presented to the Board for approval in May but, as explained below, performance increases do not go into immediate effect.

Several months into the fiscal year, typically in October, Brophy undertakes a review of HMC's financial statements for the first quarter and examines forecasts of the Hospital's finances for the next twelve months to determine whether the Hospital is meeting its budget targets. Utilizing that information, Brophy decides whether to recommend to the CEO that the Hospital grant a performance increase for non-bargaining unit members and, if so, whether that increase should be at the level initially projected in May or in some other amount. Since the SAP was implemented in 2013, the percentage amount which Brophy recommended to the CEO for performance increases has not been different than the percentage she initially projected in May. If Brophy recommends an increase and the CEO decides to approve that recommendation, the Hospital is then obligated to provide performance increases under the SAP to each eligible non-bargaining unit employee. Although the CEO approves an aggregate percentage increase, the exact amount each employee will receive for that year is not determined until after performance evaluations have been completed and the salary increase "matrix" has been prepared.

IV. Performance Evaluations, Salary Bands and the Matrix

The percentage increase approved by the CEO is not applied equally to all employees; rather, the SAP is intended to reward high performing employees and provide additional compensation to those employees who are being paid less than the market rate for comparable work. The first step in this process is the completion of performance evaluations for each non-bargaining unit employee. Prior to 2014, performance evaluations were conducted on paper with the same criteria applicable to all employees. In September of 2014, Respondent began utilizing an electronic tool with evaluation criteria specific to each position. This evaluation tool measured job performance from October 1, 2013, through September 30, 2014. Employees receive an overall evaluation score of "outstanding," "solid performance" or "needs improvement." Brophy estimated that only two non-bargaining unit employees each year have received a "needs improvement" since the SAP was implemented in 2013. Although the electronic evaluation tool adopted in 2014 was still being utilized at the time of the hearing, the HMC maintains the discretion to modify it at any time.

In addition to performance evaluation scores, HMC compares employee earnings with those of other positions within the market to determine the salary increase that each eligible employee will receive under the SAP. This calculation is made using a chart which was initially prepared by the consulting firm and later updated by the Human Resources Department. To prepare the chart, the firm conducted a market study of all non-bargaining unit positions and determined what "grade" each position falls within based upon the range of salaries for the same or similar positions within the market. An individual employee's grade is then cross-referenced with his or her actual current hourly salary to determine whether that individual falls within the low, middle or high "band" for that grade. The low or "minimum" band consists of employees who are earning in the bottom 30 percent of the grade, while employees earning in the top 30 percent of the grade are placed in the high or "maximum" band. The remaining 40 percent of employees fall within the middle or "midpoint" band. The version of the salary band chart which was in use by HMC at the time of the hearing was introduced by Respondent as Exhibit 16 and is reproduced below:

Grade	Low	Middle Band	High
	Minimum	Midpoint	Maximum
14	$15.24	$18.67	$22.10
15	$16.57	$20.30	$24.02
16	$18.01	$22.06	$26.11
17	$19.61	$24.51	$29.41
18	$21.79	$27.24	$32.68
19	$24.21	$30.26	$36.31
20	$26.90	$33.62	$40.35
21	$29.97	$38.21	$46.45
22	$34.06	$43.42	$52.79
23b	$37.95	$43.65	$49.34
23	$37.95	$49.34	$60.73
23a	$49.34	$55.04	$60.73
24	$43.13	$56.07	$69.01
25	$49.78	$65.96	$82.14
26	$58.57	$77.61	$96.64
27	$68.91	$91.30	$113.69
28	$81.48	$110.00	$138.52

Exhibit 16

Once the performance evaluations have been submitted, Brophy, with the assistance of Summer Jenkins, a Human Resources employee, constructs the salary "matrix" for that fiscal year. The matrix is a chart which allows Respondent to determine the amount of salary increase each eligible employee will receive under the SAP by correlating data from performance evaluation scores and the salary band chart described above. In creating the matrix, Brophy and Jenkins use a trial and error approach to ensure that the percentage increases for each individual employee do not result in an aggregate increase greater than the overall percentage increase approved by the CEO. For example, the CEO approved a two percent salary increase for the 2014 fiscal year. Based on the performance ratings for each employee and the band data, Brophy and Jenkins adjusted the percent increase for each level on the matrix so that high performing employees who were earning below the market rate received the highest percentage increase while still ensuring that the aggregate increase for all non-bargaining unit employees was at or near the two percent amount approved by the CEO.

Reproduced below is the final version of the matrix for FY 2014 which was introduced into evidence by Respondent as part of Exhibit 17 at hearing:

2014	Band			
	Low	Middle	High	Above (Lump Sum)
Performance Rating				
Outstanding	2.50%	2.25%	2.00%	0.00%
Solid Performer	2.25%	2.00%	1.75%	0.00%
Needs Improvement	0.00%	0.00%	0.00%	0.00%

Excerpt from Exhibit 17

To determine the actual salary increase that each individual employee will receive under the SAP, the performance evaluation score is cross-referenced with the band data on the matrix prepared for that fiscal year by Brophy and Jenkins. For example, based upon the range of salaries of similar positions, a Surgical Multi-Specialist Advanced Practitioner I was identified by the outside consulting firm as a Grade 23a position. An individual employed in that position who was earning $50.74 during the 2013 fiscal year fell within the low or "minimum" band on Exhibit 16. As a result of receiving an outstanding evaluation score, that individual was entitled to a 2.50 percent raise when the SAP increases approved by the CEO went into effect in November of 2014 utilizing the matrix set forth in Exhibit 17. By comparison, the Surgical Specialist Advanced Practitioner position is at Grade 23 based upon the consulting firm's market study. An individual employee in that position who was earning $44.77 in FY 2013 fell within the middle or "midpoint" band. That employee was entitled to a 2.25 percent increase under the SAP as a result of receiving an outstanding performance evaluation score.

Although the matrix is recalculated each year, Brophy conceded that the only real variation within the SAP is the aggregate percentage approved by the Hospital for increases. Brophy testified that once that total percentage increase is known, it is simply a matter of figuring out how that amount will be divided up to ensure that the performance increases allocated to individual non-bargaining unit employees does not exceed the aggregate percentage approved by Respondent. For example, if every employee received an outstanding evaluation in a given year, the matrix would have to be readjusted so that the percentage increases within each band were lower overall.

V. Performance Increases under the SAP

For the 2013 fiscal year which ran from July 1, 2012, through June 30, 2013, HMC set aside one percent of the budget for all non-bargaining unit salaries to be used for performance

increases under the SAP. The performance evaluation period for that year covered July 1, 2012 through June 30, 2013.

As noted, the evaluations were completed on a paper form with the same criteria used for every employee. The one percent performance increase became effective on October 1, 2013. The PAs and NPs employed by the Hospital were not part of any bargaining unit at the time and employees in those positions who were otherwise eligible under the terms of the SAP received performance increases.

The Hospital budgeted and approved a salary increase in an amount equal to two percent of all non-bargaining unit wages for the 2014 fiscal year, which covered the period July 1, 2013, to June 30, 2014. The increase was initially scheduled to go into effect on October 1, 2014. However, as a result of the change in the performance evaluation tool, evaluations were not actually completed until the end of September. As a result, Respondent revised the SAP manual, changing the effective date of salary increases from October 1 of each year to the first day of the first full pay period in November. Rather than pay employees retroactively, the Hospital adjusted the increase amount for the 12-month period to calculate over 11 months. Although Charging Party was certified as the exclusive bargaining representative for the PAs and NPs on October 7, 2014, before the SAP increases went into effect, eligible employees in those positions received performance increases for that fiscal year.

The 2015 fiscal year covered the period July 1, 2014, to June 30, 2015. For that year, HMC set aside three percent of the budget for all non-bargaining unit salaries to be used for increases under the SAP. HMC calculated the increases for each eligible employee based on his or her current wage rate to market value and performance evaluation scores. The evaluation period for that year covered the period of October 1, 2014, to September 30, 2015. Eligible employees received performance increases under the program beginning the first full pay period of November 2015. PAs and NPs employed by the Hospital were not awarded performance increases. Brophy testified that had the PAs and NPs been considered eligible for the 2015 performance increase, the percentage granted to each non-bargaining unit employee would have been different since there would have been more employees sharing the same pool of money. However, according to Brophy, the Hospital would still have opted for an aggregate increase of three percent.

In email messages to Respondent dated November 23, 2015, and November 30, 2015, Jeff Fleming, business representative for Local 459, questioned whether Charging Party's members would receive increases in 2015 under the SAP during the course of negotiations on an initial collective bargaining agreement. HMC's attorney, Kendall Williams, responded to Fleming by letter dated December 1, 2015. Williams wrote that due to the discretionary nature of the SAP and the fact that the program could be amended or discontinued at any time at the sole discretion of the CEO, the Hospital was obligated to negotiate with the Union about such increases. Williams continued, "Were Hurley Medical Center to make these discretionary increases without bargaining, it would violate its obligation to bargain with Local 459 about terms and conditions for its members." Williams concluded the letter by stating, "I look forward to negotiating this wage issue, as well as other outstanding economic issues with Local 459 in

the near future. As you requested, we are in the process of securing potential negotiation session dates for you and your team to consider."

In an email message to Williams dated December 30, 2015, Fleming asserted that the performance increase is "more akin to a step increase than a discretionary pay raise" and that it was the Union's position that increases under the SAP constituted "a working condition which must be continued." In an attempt to alleviate the Hospital's concern that granting the increase to Charging Party's members would constitute an unfair labor practice, Fleming offered to waive the Union's right to bargain over HMC's obligation to grant the increase to PAs and NPs for the 2015 fiscal year "on a non-precedent setting basis." However, Fleming indicated that the Union reserved is right to negotiate over performance increases for future years. Fleming requested that the Hospital provide a response to his proposal by no later than January 11, 2016, and threatened to take "appropriate legal action" if an acceptable response was not received by that deadline.

On January 19, 2016, representatives of the Hospital and Local 459 convened for a collective bargaining session during which Respondent sought clarification from the Union of its offer to waive its right to bargain regarding the performance increase which went into effect in November of 2015. Fleming explained that the Union's proposal was for a very limited waiver, which covered the November 2015 increases only. In response, HMC indicated that it would address Charging Party's "economic proposal" within the scope of collective bargaining and that the Hospital would not pay any performance increase to the members of Local 459 for the 2015 fiscal year. The Union filed the instant charge on April 26, 2016.

For the 2016 fiscal year which ran from July 1, 2015, through June 30, 2016, the Hospital set aside three and a half percent of the budget for all non-bargaining unit salaries to be used for performance increases under the SAP, effective November 2016. Charging Party's members did not receive increases for that fiscal year.

Since Charging Party was certified as the exclusive representative for the RNs and PAs, there have been negotiations between the Union and the Hospital about economic issues, including performance increases under the SAP for the 2015 and 2016 fiscal years, as well as discussions concerning retroactive payments to the members of Local 459 for those increases. However, Brophy testified that she could not go back and figure out the precise amount that each eligible PA and NP would have received given that their inclusion in the SAP program would have impacted the overall calculations she relied upon to formulate the matrix.

Discussion and Conclusions of Law:

Charging Party asserts that HMC violated Section 10(1)(e) of PERA by unilaterally discontinuing the established practice of providing performance increases to RNs and PAs after the Union became certified as their exclusive representative. According to the Union, there has been a consistent practice by Respondent of granting performance increases each fall based upon well-established criteria. Charging Party contends that this practice created an expectancy amongst the affected employees that such increases would continue pending negotiations on an initial contract. While conceding that the aggregate percentage increase has varied each year, the

Union asserts that the exercise of discretion by the Hospital as to that one element of the program does not relieve it of the duty to maintain the status quo with respect to wage increases.

Respondent argues that it has lawfully maintained the status quo while negotiating a first contract with Local 459. According to HMC, performance increases under the SAP are purely discretionary. HMC asserts that two years of eligibility for performance increases under the SAP is insufficient to establish a condition of employment and that the prior increases varied with respect to timing, methodology and amount. For these reasons, the Hospital argues that it would have violated its duty under Section 10(1)(e) of PERA had it unilaterally granted a wage increase to the RNs and PAs after Charging Party was certified as their bargaining representative. Alternatively, Respondent argues that it has fulfilled its obligation to bargain with the Union about all terms and conditions of employment, including wages.

Under both Section 15 of PERA and Sections 8(a)(5) and 8(d) of the National Labor Relations Act (NLRA), 29 USC 150 et seq., the federal statute upon which PERA is modeled, an employer has the obligation to bargain with the representative selected by a majority of its employees for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment. Such issues are mandatory subjects of bargaining under MCL 423.215(1). See also *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). As a consequence of this obligation, an employer may not unilaterally change a term or condition of employment without bargaining with the Union absent an impasse in collective bargaining negotiations, *Ottawa County v Jaklinski*, 423 Mich 1, 13 (1985), or a clear and unmistakable waiver by the bargaining representative. *Lansing Firefighters Union, Local 421 v Lansing*, 133 Mich App 56 (1984). The policy reason against unilateral action prior to impasse serves to foster labor peace and must be liberally construed, especially in light of the ban against striking by public employees set forth in MCL 423.202; *Local 1467, International Ass'n of Firefighters, AFL-CIO v Portage*, 134 Mich App 466, 472 (1985).

An employer's duty to maintain the status quo while negotiating a collective bargaining agreement is not limited to wages, hours and terms and conditions of employment established as a result of a contract entered into between the employer and the current union or its predecessor. The prohibition against unilateral changes applies with equal force while the parties are bargaining a first contract. The seminal case in this regard is *NLRB v Katz*, 369 US 736 (1962). In *Katz*, the employer, during negotiations with a newly certified bargaining agent, unilaterally granted merit increases to certain of its employees and put into effect a new sick leave plan. The Court found that the employer’s action with respect to such mandatory subjects of bargaining constituted a violation of Section 8(a)(5) of the NLRA. The Court rejected the employer’s argument that the wage increases were consistent with its long-standing practice of granting quarterly or semi-annual merit reviews, finding instead that the raises in question were “in no sense automatic, but were informed by a large measure of discretion.” The Court held that “There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.” *Katz* at 746. The Court described the employer’s decision to grant the increase as “tantamount to an outright refusal to negotiate on that subject” and characterized the employer’s conduct as a

"circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." *Id.* at 743.

Although *Katz* involved the unilateral continuance of a merit wage increase program, the Commission, the National Labor Relations Board (NLRB) and the courts have interpreted the decision as applying to both the granting and withholding of wage increases and other practices. See e.g. *Mid-Michigan Cmty College*, 1988 MERC Lab Op 471; *Oneita Knitting Mills*, 205 NLRB 500 (1973); *SE Mich Gas Co*, 198 NLRB 1221 (1982). Regardless of the nature of the unilateral act, the determining factor with respect to whether an employer has violated its duty to bargain is whether there has been a change in existing conditions of employment. *Peabody Coal Co v NLRB*, 725 F2d 357 (CA 6 1984). "In other words, whenever the employer promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then [it] is not at liberty unilaterally to change this benefit for better or worse during . . . the period of collective bargaining." *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enf'd 73 F3d 406 (DC Cir 1996), cert den 519 US 1090 (1997), quoting *NLRB v Dothan Eagle*, 434 F2d 93, 98 (1970). In determining whether merit increases are part of the employees' existing wage structure, the following factors have been found to be relevant: (1) whether the increases are based on a fixed criterion of merit; (2) whether the timing of the increase is fixed; (3) whether the amount of the increase, although discretionary, falls within a narrow range; (4) whether the majority of eligible employees receive the increase; and (5) whether the increase has been granted over a significant period of time. *Dynatron/Bondo Corp*, 323 NLRB 1263, 1264 (1997), enf'd in relevant part 176 F3d (CA 11 1999); *Daily News*, *supra*.

In the instant case, Respondent established a practice of reviewing each non-bargaining unit employee's job performance annually and giving a merit-based increase to eligible employees. An employee is eligible for a wage increase as long as he or she receives a satisfactory or better performance evaluation score and was hired prior to the beginning of the current evaluation period. Typically, only one or two non-unit employees each year are ineligible for the performance increases as a result of having received a low evaluation score. Although Brophy testified that the Hospital has the right to discontinue the SAP at any time, the record establishes that performance increases have been granted every year since the program was implemented in 2013 and that the amount of the increases has varied by a percentage or less from year to year. Once the increase has been approved by the CEO, determining how that amount will be divided up amongst eligible employees is simply a matter of entering each employee's performance evaluation scores and job band data into the matrix, with some manual adjustments to the matrix by Brophy and her staff to ensure that increases to individual employees do not exceed the cumulative percentage approved by Respondent. In fact, Brophy testified that the only real variation in the SAP each year is the overall amount set aside by Respondent which, as noted, has fallen within a very narrow range. Based on the record, I conclude that HMC's practice of conducting performance evaluations and granting wage increases based on those evaluations, as well as other fixed criteria, was an established practice regularly expected by its employees which the Hospital was not entitled to discontinue without first reaching an agreement with the Union or bargaining to impasse on the subject.

The NLRB reached the same conclusion based on remarkably similar facts in *United Rentals, Inc*, 349 NLRB No. 83 (2007). *United Rentals* involved a system pursuant to which the

employer conducted an annual performance review resulting in ratings ranging from "very good" to "unacceptable." Utilizing those ratings, the employer granted merit-based wage increases on an annual basis.

The employer used a "merit matrix" to calculate a recommended wage increase based upon criteria which included the budgeted amount for wage increases, the employee's position, grade and corresponding salary band, and the employee's performance rating. The employer entered the performance evaluation data into the matrix to arrive at a recommended increase for each employee. Thereafter, management had discretion to adjust or reallocate the increase. Increases were granted to employees on April 1 of each year since the system was implemented in 2001. Four years later, the union was certified as the bargaining representative of a unit of United Rentals' employees at one of its facilities and negotiations commenced on a first contract. However, the employer, without providing notice to the union, failed to give evaluations and wage increases to the newly certified employees. Non-unit employees and employees at United Rentals' other facilities continued to receive merit-based wage increases. The NLRB concluded that the employer's system of adjusting wages was an established practice regularly expected by its employees and, therefore, a term or condition of employment. In so holding, the Board rejected the employer's argument that the merit-based system was "wholly discretionary," concluding instead that the amount each employee received under the system was based on established procedures and fixed criteria. *Id.* at 3. In addition, the Board relied upon the fact that the system had been in place for four years and that increases had been effective the same time each year. *Id.* As a remedy, the Board ordered the employer to perform the evaluations and retroactively grant pay increases to eligible employees. *Id*. at 4.

Central Maine Morning Sentinel, 295 NLRB 376 (1989) also involved an attempt by an employer to justify the discontinuation of a wage increase system based upon a claim that the increases were too discretionary to constitute a term or condition of employment. In *Central Maine*, the employer had a practice of granting its unrepresented employees an annual wage increase each January or February. The employee handbook described the raise, which varied from 8.9 percent in 1981 to four percent in 1987, as an increase "determined periodically" by management "intended to reflect economic and competitive conditions." After the union was certified as the collective bargaining representative for editorial department employees, the employer extended a general wage increase of four percent to both unrepresented and editorial unit employees. The following year, however, the employer granted another four percent increase to unrepresented employees but denied it to the union's members. The NLRB found that the employer's refusal to grant the increase to editorial department employees constituted a violation of its duty to bargain:

> [T]here can be no question that the annual wage increase was a fixed condition of employment. As noted above, the Respondent regularly granted an across-the-board annual increase for many years, at least since 1981. Given the consistency of the Respondent's practice, the work force surely was entitled to regard it as a permanent element in their wage structure program.
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> * * *

> The Respondent submits that the annual pay raise was discretionary and subjective and, therefore, was not a mandatory subject of collective bargaining. To be sure, the Respondent retained discretion to determine the amount of the pay raise. But the exercise of some discretion is not fatal to the conclusion that the raise was a condition of employment. Here, Respondent followed a consistent course: It did not deviate from year to year in deciding that a raise would be granted; it applied a formula derived from uniform factors across-the-board and granted it to all employees whose wages were not governed by collective bargaining agreements. Since Respondent and the Union had not reached agreement on a labor contract by February 1, the represented editorial unit employees (unlike other represented workers already covered by extant labor contracts) continued to be eligible for the 1988 raise as an absolute condition of their employment. [*Id*. at 379 (citations omitted)].

See also *Tampa Electric Co*, 364 NLRB No. 124 (2016) (employer violated Section 8(a)(5) and (1) of the NLRA by withholding customary annual merit wage increases which were based upon a fixed criterion of merit); *Daily News of Los Angeles*, *supra* (merit-based wage increases that were entirely discretionary in amount nevertheless constituted a past practice because they were based on a fixed criterion of merit); *Harvey's Hotel Casino*, 1993 WL 1609405 (the ALJ found a violation where, shortly after the union was certified, the employer unilaterally discontinued its discretionary salary administration program which had included wage increases to unit employees based upon a "merit increase matrix"); *Hyatt Corp v NLRB*, 939 F2d 361 (CA 6 1991) (although wage policy had not yet ripened into a longstanding practice, increases constituted an established condition of employment where they were made pursuant to guidelines embodied within a policy which the company intended to continue indefinitely); *NLRB v Newtown Corp*, 705 F2d 873 (CA 6 1983) (wage increases were a term or condition of employment despite the fact that the employer had discretion whether to grant or withhold such increases based upon existing economic conditions).

In support of its contention that performance increases under the SAP program did not constitute an existing term or condition of employment, Respondent relies upon *Mid-Michigan Cmty College*, 1988 MERC Lab Op 471. In *Mid-Michigan*, the employer had an established practice of providing an annual wage increase to its hourly employees, effective July 1 of each year. The wage increase had two elements: an overall wage adjustment, and a step increment based on years of service. Following certification of a bargaining representative for support personnel in June of 1986, representatives of the college announced that a wage increase would be a negotiable item. The union maintained that as the granting of a yearly wage increase was a long-established practice of the college, it was a violation of its bargaining obligation to fail to grant a wage adjustment effective July 1, 1986. The ALJ found that as there was no ascertainable, scheduled, or set wage increase due hourly rated employees on July 1, 1986, the employer could not unilaterally grant a wage increase without violating its bargaining obligation under PERA. While finding that the employer's ten-year practice of giving step increases for additional years of service constituted a condition of employment, the Commission agreed with the ALJ that there was no pattern or practice of giving a set percentage across-the-board increase, and that an overall wage adjustment was not an established practice which the employer had a duty under PERA to maintain.

Respondent asserts that wage increases under the SAP are akin to the across-the-board raises which were at issue in *Mid-Michigan*. I find HMC's reliance on that decision distinguishable.

In *Mid-Michigan*, the record established that there was no uniformity with respect to the overall wage adjustment. Some years, there was no across-the-board wage increase given. When such increases were given, they varied considerably from year to year. In contrast, Respondent in this proceeding has granted performance increases to all eligible non-bargaining unit employees every year since the SAP was implemented, the increases were based upon fixed criteria incorporating performance evaluation results and market rates, and the overall amount approved has remained consistent. Similarly, the ALJ's decision in *Michigan Tech Univ*, 20 MPER 36 (2007) (no exceptions) does not support the Hospital's position that it was free to unilaterally discontinue the SAP for Charging Party's members. In *Michigan Tech*, the ALJ found that while the University had an established practice of granting wage increases to its faculty each summer, it was obligated to bargain over all other aspects of the salary increases after the union was certified, including the size of the salary pool as well as the percentage allocated to pay merit pay, market/equity pay and promotional increases. The ALJ's holding was premised on the fact that there were substantial variances from year to year in the size of the salary pool and that there was no recognized formula for allocating the money approved by the University amongst faculty members. As noted, that uncertainty is not present in the instant case.

Respondent asserts that even if performance increases were an established term or condition of employment, no PERA violation has been proven in this proceeding because the Hospital bargained with the Union concerning application of the SAP to its members. Such an argument would have merit if there had been evidence establishing that the parties were at impasse at the time HMC failed or refused to grant performance increases to the PAs and NPs. However, there is nothing in the record, including the stipulation of facts, affidavits and Brophy's testimony at hearing, establishing that an impasse had been reached when Respondent announced its intention to discontinue performance increases for members of Charging Party's bargaining unit on January 19, 2016, nor does the Hospital argue that an impasse had been reached when the increases were withheld from PAs and NPs in November of 2016. The fact that the parties discussed performance increases at the bargaining table does not in any way establish that Respondent satisfied its duty to bargain under Section 10(1)(e) of PERA. The record in this matter demonstrates that the Hospital had an established practice of granting annual performance increases to non-bargaining unit employees. The PAs and NPs who selected the Union as their bargaining representative remained in this class following certification and the onset of negotiations and therefore reasonably expected that the increases would continue to be part of their conditions of employment, at least until a first contract was entered into, or until the parties had bargained to impasse over altering these conditions. Neither event occurred in this case. See *Central Maine Morning Sentinel*, *supra*.

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

RECOMMENDED ORDER

Respondent Hurley Medical Center, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain collectively with the Office and Professional Employees International Union, Local 459 with respect to performance increases under the Salary Administration Program (SAP) by unilaterally withholding said increases in 2015 and 2016.

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

   a. On request, bargain collectively with the Union as the exclusive collective bargaining representative of its employees.

   b. Reinstate the SAP for eligible members of the bargaining unit until a new collective bargaining agreement is entered into containing different terms or the parties reach a legitimate impasse in negotiations.

   c. Make whole the employees in the bargaining unit for any monetary losses they have suffered by reason of Respondent's unilateral withholding of the 2015 and 2016 performance increases, plus interest on these sums at the statutory rate, computed quarterly.

   d. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 2, 2017

1) NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, HURLEY MEDICAL CENTER, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL cease and desist from refusing to bargain collectively with the Office and Professional Employees International Union, Local 459 with respect to performance increases under the Salary Administration Program (SAP) by unilaterally withholding said increases in 2015 and 2016.

WE WILL take the following affirmative action to effectuate the purposes of the Act:

1. On request, bargain collectively with the Union as the exclusive collective bargaining representative of its employees.
2. Reinstate the SAP for eligible members of the bargaining unit until a new collective bargaining agreement is entered into containing different terms or the parties reach a legitimate impasse in negotiations.
3. Make whole the employees in the bargaining unit for any monetary losses they have suffered by reason of Respondent's unilateral withholding of the 2015 and 2016 performance increases, plus interest on these sums at the statutory rate, computed quarterly.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

HURLEY MEDICAL CENTER

By: ______________________________

Title: ______________________________

Date: ______________________________

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.