DEPARTMENT OF LABOR AND ECONOMIC GROWTH
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
FACT FINDING

Beaverton Rural Schools

----and ----

MERC Case No. L10 D-3017

Beaverton Education Association (BEA),
MEA/NEA

FACT FINDING REPORT

Appearances:

Fact Finder: Donald R. Burkholder, Ph.D.

For the Employer: Thomas Basil, Chief Negotiator

For the Association: Renaye Baker, MEA Uniserve Director

Date of Report: October 24, 2011

The Beaverton Rural Schools Board of Education (the Employer or District) and the Beaverton Education Association (BEA or the Association) have been engaged in bargaining over a successor Agreement to the 2009-2010 Master Agreement since August 17, 2010. The 73 members of the BEA unit include all certificated personnel referred to as "teachers" of Beaverton Rural Schools, excluding superintendents, assistant superintendents, business managers, principals, assistant principals, community school director, school social worker, school nurse, school psychologists, and other supervisory personnel. The most recent, two-year collective bargaining agreement, expired on June 30, 2010.

Beaverton is a small town of about 1,100 in the southern portion of Gladwin County. It has a few small industries and a great deal of open farm land. The school district buses children from a wide area surrounding the town.

At the Employer's request, the two parties met for a mediation session on December 16, 2010; the Board then applied for fact-finding on March 8, 2011. The fact finding hearing was held on July 13, 2011; briefs were exchanged in mid-August.

Through prior negotiations and mediation sessions the parties made significant progress in narrowing the issues for fact finding, Major issues remaining include salary, insurance, and calendar. Language issues include Articles 4 C and F, professional compensatory time; Article 5 A 1, teaching hours; Article 8 A, Vacancies and Promotions; Article 10 A, and B 4, 5, 14, and 15, Leave Policies; Article 11 C, Personal Leave; Article 13, Evaluation, A, B, C, D, and E, with an Association – proposed F; Article 16, Professional Grievance Procedure, A and N; Article 17, Miscellaneous Provisions, D.

The context in which any dispute takes place must be known and acknowledged in order reach any reasonably realistic agreement, and for a Fact-Finder to offer sensible recommendations. The nature of 'new' or recently enacted legislation directly impacting Fact Finding in public education and local government, as well as the unpredictable manner in which these statutes may be implemented, are concerns which must be taken into account, or at least acknowledged. The 'new' statutes, particularly those dealing with education, include provisions for appointment of an emergency financial manager; increasing the percentage of the cost of health insurance required of the employee by

capping the employer portion; freezing wages and benefits; establishing additional significant limitations on collective bargaining between a public school employer and a bargaining representative of its employees; and 'reforming' the teacher tenure process. The major changes in present and past practice envisioned/required by the 'new' legislation is almost certain to breed legal challenges, delaying resolution and likely necessitating substantial expenses. Especially in view of these uncertainties, I emphasize that the recommendations of this Fact Finder are just that, recommendations, formulated in an environment akin to tap dancing on ice, with the intent that they will be useful in moving the parties toward resolution. In view of these major changes in the law, and the resultant additional vagaries, the usefulness and the value of comparability is substantially reduced, but has been considered. Generally, they indicate that BEA salary and benefits are in the middle to lower half of the comparables, and that the Employer's unreserved general fund balance at the end of each budget year is considerably below the 10 to 15 percent flexible standard suggested by an association of public school finance officers, as well as the approximately 10 percent suggested by a national organization of local general government finance officers. The finance authorities of the professional organizations recognize, as does this Fact Finder, that application of these suggested measures of financial viability are subject to the unpredictable variations in a governmental unit's specific situation.

A selective summary of highlights of four recently enacted Michigan Statutes relating to public sector employees and the dates they become effective, with particular reference to employees in public education, is as follows:

> Public Act 54 of 2011, effective June 8, 2011, freezes wages and benefit levels, including wage step increases, upon the expiration of a collective bargaining agreement; shifts any increased cost of maintaining "health, dental, vision, prescription or other insurance benefits" to employees, also

authorizing increased payroll deductions to fund such increases; forbidding parties to agree to or an arbitration panel to order retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration of the collective bargaining agreement. If a collective bargaining agreement expired before June 8, 2011, wages and benefits are limited to amounts in effect on that date.

Public Act 152 of 2011 establishes limits on the amounts that a public employer may pay for health care benefits (including but not limited to hospital and physician services, prescription drugs and related benefits") or be subject to sanctions. Beginning with benefit year commencing January 1, 2012, annual limitations are either a "hard cap" or an 80/20 provision, requiring that the employer contribution may be no more than 80% of its total expenditure for employee health benefits. The hard cap is $5,500 single; $11,000 individual and spouse; and $15,000 family.

Public Act 4 of 2011, effective March 16, 2011 The "local government and school district fiscal responsibility act," provides a detailed process to ascertain fiscal responsibility, and to appoint a local government emergency financial manager for general local governments and school districts.

Public Act 100 of 2011, effective July 19, 2011 – A tenured teacher may be discharged or demoted only for a reason that is not arbitrary and capricious (previously for reasonable and just cause); probationary period is extended to the first five full school years unless a teacher is rated highly effective on three consecutive year-end evaluations (previous probationary period first four full school years).

This Fact Finder wrote to the parties in mid-September 2011, noting that the guidelines utilized by a number of Michigan Fact Finders are found in Section 9 of Public Act 312, while the law and rules pertaining to Fact-finding provide no criteria that must be used in determining recommendations. Section 9 standards, required to be followed by Arbitrators involving public employers in disputes with police and fire unions, include several subsections adapted to Fact Find. Two telephone conferences provided the framework for agreement that the parties have the opportunity to submit additional information, simultaneously sharing it with the other party. Such information would include the District's 'final' audit, if it was available. However, it was not available by the time of final formulation and submission of this Fact-Finding report.

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Section 9 contains the eight factors the arbitration panel must consider as applicable as follows:

(a) The lawful authority of the employer.
(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally.

(i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(e) The average consumer price for goods and services, commonly known as cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration hearing.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

I note that Section 9 includes (paraphrased) consideration of the financial ability of the unit of government to meet the proposed costs, comparables, and changes in circumstances during the pendency of the hearing, which is generally interpreted to mean until the decision is issued. It is not required that each element receive equal weight; indeed consideration of the ability to pay criteria is the most crucial factor to be dealt with, according to the training 312 arbitrators including this Fact Finder have received and recently enacted legislation. Taking note that the employer's unreserved general fund balance at the end of each budget year is generally considered the most useful measure of overall financial health, and recognizing that other factors are likely to come into play, the number of students present on final count day is the single most basic factor in determining the amount of state aid and the district's overall financial viability during the upcoming year. With these factors in mind, and based on a 'common sense' approach to

the matters at hand, I asked to be notified of the official count of students when the count was finalized.

Comparables offered by the Employer and accepted by both parties are are West Branch-Rose City, Gladwin, Standish-Sterling, Clare, Meridian, Coleman, and Pinconning. The Bullock Creek District was proffered by the BEA but was not agreeable to the Employer, which asserted that it is a much larger district, and that other factors such as the athletic conference and BEA zone-organizing come into play. The BEA asserts that Beaverton salaries rank sixth of the nine comparables, with a BA minimum of $33,295. With the contract changes proposed by the Employer, particularly with a zero salary increase or a possible decrease, as well as increased health/medical insurance costs, the union asserts that the minimum salary would be $28,000.

Language Recommendations:

Article 4, Professional Compensation (C) – The Employer requests personal day compensation, one hour for one hour. The Employer prefers current contract language, which provides hour-for-hour compensation time to be used at the teacher's discretion in accordance with Article XI, C, paid at the rate of $32.50 per hour.

Recommendation: Current contract language. There is no indication that this proposal would provide significant cost saving, and

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Article 4, Professional Compensation (F) – The District wishes to delete arbitration from language providing that any teacher engaged during the school day in any grievance negotiation on behalf of the BEA shall be released from regular duties without loss of pay.

Recommendation: Current Contract language. There is no convincing rationale for such a change.

Article 5, Teaching Hours (A1) – The District proposes language to enable it to define duty time as a seven (7) hours and 40 minute time period, as set by the Employer, with a minimum notice of two (2) weeks. Current contract language provides for K-3 teachers to be in their assigned buildings between 7:45 a.m. and 3:35 p.m.; 4-12 teachers are expected to be in their assigned between the hours of 7:50 a.m. and 3:30 p.m. unless permission is obtained from the building principal to deviate from these times.

Recommendation: Proposed Employer language. The Employer is persuasive in its stance that particularly in a rural environment children are often waiting in the pre-dawn dark to be bussed to school. Some Employer discretion in setting the starting time is reasonable.

Article 8, Vacancies and Promotion (A) –

Current Language:

Whenever any vacancy in any Professional position in the district shall occur, the Board shall publicize the same by giving written notice of such vacancy to an Association Officer and provide for appropriate posting in every school building and on the Beaverton Rural Schools website (beaverton.k12.mi.us). No vacancy shall be filled except in case of emergency or on a temporary basis, until such vacancy shall have been posted for at least fifteen (15) calendar days; unless the administration is provided with writteb approval from the BEA President or other BEA ranking officer.

District Proposal to <u>add</u> the following language:

A vacancy is an opening the Board of Education intends to fill, to which no bargaining unit member has a claim..

BEA Proposal to add the following language:

A vacancy shall be defined for the purposes of this Agreement as:

1. A position presently unfilled, but previously held by a bargaining unit member. Other than when a bargaining unit member is on leave for less than one whole school year.

2. A position currently filled but which will be open in the future because of retirement, resignation, or dismissal.

3. A newly created position, but recognized as a bargaining unit position by nature and duties assigned.

4. A position that will be open for more than one school year due to a bargaining unit member taking a leave of absence.

Recommendation: Proposed BEA language. More detailed language is preferable. The probability is that additional grievances, dissatisfaction, etc., would result from outright denial of a unit member's ability to seek an open position. The BEA proposal is to retain the status quo..

Article 10, Leave Policy, (A4) – Proposed **new** language by Employer is in **bold.**

A teacher absent from work because of mumps, scarlet fever, measles, chicken pox, pink eye or lice shall suffer non diminution of compensation and shall not be charged sick leave **if the sickness or disease is present in Beaverton schools.** Work related blood exposures, which may constitute danger of infection and requires medical attention are also covered.

Recommendation: BEA proposal. The original intent of this language appears to have been to prevent an epidemic in the district which could result in financial loss for the Employer I concur with the BEA that verification and/or enforcement of the Employer proposal would be a monumental task for the District and would be likely to motivate grievances.

Article 10, Leave Policy, B 4, 5, 14, 15

The Employer proposes to remove the following language pertaining to Maternity and Adoption Leave of Absence, as well as remove language provisions allowing retirement benefit and payout of unused sick time upon retirement.

B Leaves of Absence

4. Maternity leave will be granted upon request to female teachers up to a maximum of one (1) year renewable at the discretion of the Board. The application for such leave shall be accompanied by a statement from the attending physician giving the anticipated date of birth and an evaluation of the health of the teacher. Such leave shall commence when the teacher is no longer able to adequately perform the duties to which she is regularly assigned. Sick leave with pay will be allowed, up to the number of days the teacher has accumulated in sick leave, for the period the teacher is physically unable to perform the duties to which she is regularly assigned.

   Should the course of nature be interrupted or should the death of the child occur during the period of leave, regulations regarding return to employment may be relaxed at the discretion of the Superintendent.

5. Adoption of a child(ren) shall be considered appropriate cause for leave request; the procedures are covered under Board of Education Policy #3430.01 and Administrative Guidelines 3430.01a/3439.01B Family Leaves of Absence.

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14. Upon retirement and entering a teacher retirement program or upon death, after ten (10) years service to the Beaverton Rural Schools, the Board agrees to grant terminal leave pay amounting $75.00 per year, in the system, up to a maximum of $2,250.

15. Teachers who terminate their employment with Beaverton Rural Schools after at least 10 years of service in the District, shall be paid 50% of the substitute teacher rate (at the time of employment termination) for each unused sick day they have accumulated. Teachers may opt out of this payout for accumulated sick leave instead of the terminal leave pay of Paragraph B., 14 above. They shall not receive both payments.

Recommendation: BEA proposal, i.e., status quo. There is no apparent rationale or justification for altering language and practice. The costs, while considerable, are justifiable in terms of employee expectations and morale. The BEA asserts that this option/alternative can be a money saver for the District since it is an unpaid leave of absence, which may not be the case with Family Medical Leave.

Article 11 – Personal Leave (C)

The District wants to eliminate the process for the use of personal days prior to school scheduled vacations and holidays. The Employer would retain only

the first paragraph, eliminating language detailing the method of applying for leave.

The first paragraph, i.e., the District-proposed entire article, would read as follows:

> C. Each teacher shall be allowed the use of one (1) personal day in the month of May Additional personal days may be allowed at the discretion of the Superintendent on a case by case basis. No case is to be precedent setting.

The BEA asserts that there have been no issues in the recent past with over-usage of these personal days that have been brought to the Association's attention. The argument is that elimination of the present very detailed language setting forth the process would create the likelihood that claims of arbitrary and capricious decisions.

Recommendation: The Association proposal for current language is reasonable, especially inasmuch as no significant problems appear to have developed. The procedure is complex, but appears to be advantageous in terms of minimizing resulting conflict. The Employer proposed language would give the Superintendent complete discretion over additional personal days, beyond the one personal day in the month of May, with no procedure spelled out otherwise.

Article 13, Evaluation (A, B, C, D, and E)

The Employer proposes to eliminate all contract language referring to evaluation. The existing language is as follows:

> A. All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher. The use of eaves-dropping, closed circuit television, public address or radio systems, and similar surveillance devices shall be strictly prohibited.

B. Each teacher shall have the right upon request to review the contents of his own personnel evaluation file within the system. This excludes any confidential material, such as recommendations from colleges, universities, and previous employers. A representative of the Association may be requested to accompany the teacher in such review.

C. A teacher shall at all times be entitled to have present a representative of the Association when she/he is being reprimanded, warned, or disciplined for any infraction of discipline or delinquency in professional performance. When a request for such representation is made, no action shall be taken with respect to the teacher until such representation of the Association is present.

D. No teacher shall be disciplined, reprimanded, or deprived of any professional advantage which does not amount to a demotion under the Tenure Act without just cause. Any such discipline, reprimand or deprivation including adverse evaluation of teacher performance asserted by the Board or an agent or representative thereof shall be subject to the grievance procedure hereinafter set forth..

E. The Board of Education reserved the right to make all extracurricular assignments on a year to year basis. Such assignments or dismissal from such assignments are not subject to the the grievance procedure. However, written reasons for dismissal shall be provided to the individual affected.

The Association proposes addition of new language, as subsection F, as follows:

F. Beginning in the 2011-2012 school year, a committee will be set up of four (4) Beaverton Education Association members and four (4) Beaverton Rural School designees, to determine appropriate change for Teacher Evaluation and Pay for Performance to ensure compliance with the Race to the Top legislation enacted in 2010. The committee will continue to meet at least once a year for each successive year to discuss possible revisions to the evaluation process to make sure that it continues to meet State and District requirements.

Recommendation: The Association proposal should be adopted in view of the need for language protecting the rights of teachers. There is no substantive reason to believe the present language plus BEA-proposed subsection F would be in conflict with Race to the Top legislation enacted in January 2010.

Article 16, Professional Grievance Procedure, (A, N 1, 2, 3, 4, 5, 6, 7)

Tentative agreement was reached on several points in a proposed Section N, which consists of proffered new language by each party The parties remain divided on the Section A proposal eliminating the ability to process a grievance in which the same or a similar issue is being processed to the Michigan Employment Relations Commission,

the EEOC, the FEPC or any other judicial or quasi-judicial body.

Employer proposals in Section N would make each party responsible for the expenses of witnesses that they may call; provide that the Arbitrator has no power to rule on the termination of service or failure to re-employ any probationary employee; and provide that the Arbitrator has no power to rule on the termination of service or failure to re-employ any probationary employee.

Recommendation: The BEA language on Section A. There appears to be no compelling rationale for restricting the ability of a BEA unit member from pursuing a perceived injustice with the appropriate federal or state agency, and I believe it would contravene their rights as ordinary citizens to attempt to do so. Taking notice that there has been tentative agreement on several Section N proposals, I recommend the BEA position on N1 regarding expenses of witnesses; the District's position on N2 stating that the Arbitrator shall have no jurisdiction to specify the terms of a new agreement, or to substitute his/her discretion for that of any of the parties. I note that arbitrators to the best of my knowledge have no such authority regardless of the contract. (Apparently this language has tentatively been withdrawn by the District.) N3, requiring an arbitrator's decision in writing within 30 days, tentatively agreed to by the parties. The BEA position on N4 is rational, objecting to proposed Employer language that the arbitrator shall have no power to rule on the termination of service or failure to re-employ any probationary employee. Such an employee would benefit from a process to ascertain that the agreement was being followed. N5, N6, and N7, each with tentative agreement, deal respectively with responsibility for paying for arbitrator charges as a result of postponement; period required to notify the superintendent when employees need to be

excused from work to attend an arbitration hearing; and extension of contract-required time limits by mutual written agreement.

Article 17, Miscellaneous Provisions (D) [Employer – proposed addition in **boldface**]

> D. This Agreement shall supersede any rules, regulations, or practices of Board which shall be contrary to or inconsistent with its terms. It shall likewise supersede any contrary or inconsistent terms contained in any individual contracts heretofore in effect. All future individual teacher contracts shall be made expressly subject to the terms of this Agreement. The provisions of this Agreement shall be incorporated into and be considered part of the established practices employed by the Board. **No past practice shall be recognized unless committed to writing and incorporated into this Agreement.**

Recommendation: The BEA language. There is no reason to 'tighten' the language on an already-specific statement, which apparently has not been fertile in breeding new issues. In other words, if the system isn't broken, why 'fix' it? The Employer-proposed additional language would probably be a magnet for creation of grievances. A 'zipper clause' can easily become counter-productive when there is an attempt to over-tighten the zipper.

In the bargaining subsequent to these recommendations, any tentative agreements should be dealt with as issues that have been decided with the understanding, of course, that they are still bargainable as trade-offs and/or by mutual agreement. Nevertheless, the fact that tentative agreement has been achieved obviously facilitates movement to agreement.

Analysis of Finances/Budget

The District's final student count for the 2011-2012 school year as of the fifth Wednesday was 1,334, with a basic foundation grant (state aid) of $6,846 per student, for a total of $9,132,564, The final student count for the previous school year, 2010, was 1,386, with a basic foundation grant of $7,162, for a total of $9,926,532. This amounts to a reduction of $793,968 from the previous year. The BEA based its estimate of income on an estimated student count of 1,378, which at $6,846 per student amount to $9,433,888, over estimating state aid by $301,224.

As set forth repeatedly by the Association, it is a fact that the Employer budgets conservatively, in light of indications that some lines/areas/parts of the organization were included in the 2010-2011 budget but nothing or little was expended. It is logical for an Employer to reduce or eliminate budgeted spending considering the fact that the unreserved general fund balance has been in the vicinity of four to approximately six percent, far below the viable levels of approximately ten to fifteen percent. Thus it is not realistic to expect that Employees not take reductions of some sort. The question is primarily whether that reduction should be in salary or in health insurance benefits, or some combination of these elements. Assuming that employees have a tax break on employer-provided health insurance benefits, a salary reduction would be preferable.

Employees in the private sector today are faced with the reality of taking reductions in order to remain employed, that is, if they remain employed. The same problem now manifests itself generally, nationwide, in the public sector as tax revenues drop in a weak economy. As the BEA asserts, its members already have experienced significant losses primarily because of the recently enacted legislation, freezing wage and

benefit levels, reforming teacher tenure, providing for an emergency financial manger, curtailing step increases, etc.

As professionals, teachers have invested heavily in higher education. They are deserving of the recognition that comes with realistic recognition of their services. It is sad that society seems in some ways to value its professional athletes more than those who spend their days attempting to stimulate and teach young minds. However, that is a personal observation which is a truism, a commentary on society's priorities. It does not alter the combination of 'facts' set forth here. As a former public school teacher, although of limited duration, it is not difficult to understand the predicament of Michigan's public school educators.

Final Recommendations:

Bargaining to retain a modified MESSA health insurance program as the primary goal appears to be the preferable route for the Association. At least, employees get a tax break on payroll deductions for health care insurance. The language issues appear to have minimal impact on district finances, but remain bargainable as part of the (suggested and implied) primary goal of the BEA, i.e., to retain high quality insurance under MESSA. I do not believe that the budget analysis justifies the five percent (5%) salary reduction proposed by the District, especially considering the BEA's apparent readiness, beyond the requirements of the recent statutes, to moderate health insurance costs. Although the BEA asserts that the District will 'save' money under the recently enacted statutes, there is no certainty that they will automatically or substantially impact the District's bottom line.

A two to three percent (2% to 3%) reduction in salary may be feasible, with the proviso that negotiations on other matters may significantly alter the 'ice floor', the slippery, uncertain basis or point(s) of departure in light of the recent statutory changes. Recommendations on language issues are set forth above.

The parties were thoroughly, competently, and professionally represented. The Fact Finder appreciates the courtesy and helpfulness of those present in clarifying a number of matters, and the general cooperation of the advocates.

Respectfully submitted,

Donald R. Burkholder, 10/23/2011
Fact Finder