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STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
BEFORE THE FACT-FINDER

In the matter of the Fact Finding between:

ALPENA PUBLIC SCHOOLS BOARD OF EDUCATION

Employer

- and -

MERC CASE NO. L09 E-3030

ALPENA EDUCATION ASSOCIATION. MEA/NEA

Union

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FACT-FINDER'S REPORT AND RECOMMENDATIONS

I. APPEARANCES

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Diane M. Block, Assistant Superintendent for Operations
Barbara Stelzer, Human Resources Administrative Assistant

Donice ZiBerna, Alpena E.A. President
Lisa Rosenbeck, Vice President and negotiator
Greg Gehrke lead negotiator and member Professional Committee
Erin Kieliszewski, member of Professional Committee and negotiator
Kirk Bascom, MESSA representative (Witness)

Dated: May 6th 2010

II. BACKGROUND

This case grows out of a dispute between the Board of Education of Alpena, Michigan ("the Board" or "the Employer") and the Alpena Education Association, Michigan Education Association, National Education Association, ("Alpena Education Association", "MEA," "labor organization", or "the Association") involving negotiation of a successor agreement.

The Alpena Education Association and Board have had labor agreements (mostly for three-years) for over two decades. The most recent three year collective bargaining agreement expired August 31, 2009.

230 APS teachers have been working without a contract since then.

Bargaining for a successor agreement began in March, 2009. There were eleven bargaining sessions, which involved both teams, and also several discussions away from the table. In September 2009, the assistance of State Mediator Tom Kreis was requested by the Employer. Mr. Kreis presided over two sessions, with some reduction in the number of issues, but no agreement. On December 14, 2009, the District requested the expedited appointment of a Fact-Finder.[1] After rejection of the initial list submitted by MERC, the parties received a second list, from which this Fact-Finder was appointed. With agreement of the parties, I conducted a pre-hearing conference on February 11, 2010. At the conclusion of that session, it is the position of both parties that only two substantive issues remain; health care and compensation.

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[1] **"factfinder** An individual or individuals of a factfinding panel designated to review issues in a labor-management dispute. The fact finding procedure is generally provided by law. Under the Taft-Hartley Act, a board of inquiry in constituted by the president to investigate disputes threatening the nation's health and safety and to report its findings to the President. Under state and local government employees collective bargaining laws, the fact finder is selected by the parties or appointed by an administrative agency and is generally required to submit nonbinding recommendations to the parties. [Sources omitted.]" Roberts, Harold S. *Roberts' Dictionary of Industrial Relations 3rd Ed.* (Washington D.C., Bureau of National Affairs, 1986), page 205.

It is to be noted that duration of the contract is not entirely resolved, although there seemed to be a consensus that a two year agreement (one year back, one year forward) might be the way to go, in light of the issues presented and the continuing uncertainty of the District's finances in the next two years. The arbitrator will say more about that later.

III. MEDIATION AND TENTATIVE AGREEMENTS

As indicated, prior to invoking fact finding,[2] the parties engaged in some formal negotiation sessions. Mediation left a large number of unresolved issues. The parties determined that the Fact-Finder would conduct a prehearing conference.[3] Despite an ultimate inability to resolve two issues, the mediation and fact finding process closed the gap. The tentative agreements are:

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[2]"**factfinding** A dispute resolution procedure. Factfinding may be conducted by a panel of three or more members or by one person who is appointed to review the positions of labor and management in a particular dispute, with a view to focusing attention on the major issues in dispute, and resolving differences as to facts. Factfinding boards have been set up under state laws and have been used on the national level. In 1946, for example, factfinding boards or panels were established in disputes involving the automobile, bus transportation, farm equipment, meat packing and oil industries.

"Factfinding procedures may be provided by law or established by the factfinder or the factfinding panel. The parties have the prime responsibility to present data, but the fact-finder or the board reserves the right to develop such additional or supplementary information as it deems proper in order to make its report or recommendations.

"The factfinder or board may merely report its determination of the facts and hope that the facts are so clear as to provide the parties with an answer. More frequently, recommendations are rendered on the basis of the facts presented. If a recommendation is made, particularly where it is unanimous, it exerts pressure on the parties to accept the recommendation. It is precisely for this reason that objections have been raised and the power to make recommendations has been eliminated in some jurisdictions. The emergency boards under the Taft-Hartley Act are forbidden to make recommendations.

"In the public sector, the factfinder or factfinding panel generally is required to provide recommendations for the settlement of a dispute. [Sources omitted.]" Roberts, Harold S. *Roberts' Dictionary of Industrial Relations 3rd Ed.* (Washington D.C., Bureau of National Affairs, 1986), p. 206.

[3]The parties themselves agreed to pay for the Fact-Finder's services for an in person prehearing conference. This was necessitated in part by the MERC's decision, due in part to budgetary restraints, to only pay for a telephonic prehearing. The parties decided that the chances of success would be enhanced by a face-to-face meeting.

Preamble

Article II - Recognition

Article III - Board's Rights

Article IV - Association's Rights

Article V - Teacher's Rights

Article VI - Professional Dues or Fees and Payroll Deductions

Article VII - Grievance Procedure

Article VIII - Conditions of Employment

Article IX - Assignments, Vacancies and Transfers

Article X - Reduction, Layoff and Seniority

Article XI - Evaluation of Personnel

Article XII - Teacher Discipline

Article XIII - Student Discipline and Teacher Protection

Article XIV - Leaves of Absence and Absences

Article XV - Joint Responsibility

Article XVI - Professional Compensation

Article XVIII - Miscellaneous Provisions

These agreements are of substantial import. They settle many complicated policy and language issues. They make arrangements on issues of power, and move the District and the Union into a better position to serve the needs of the public and their respective constituencies. They also demonstrate the good faith attempt by both parties to work through their differences, and to come to an accord based upon reason and mutual respect, despite their differences going in to the process.

The tentative agreements are incorporated herein by reference as though set forth in full, and are part of the formal Recommendations of the Fact-Finder.

An ancillary beneficial effect of the discussion was that it familiarized the Fact-Finder with the issues and interests.[4] As the Fact-Finder well knows, one can go through a formal hearing and never hear the real issues discussed, or the parties' priorities articulated.

That these agreements were voluntarily reached does not change the fact that they will make the work place work better, and will effectuate substantial changes and savings.

IV. FACT-FINDER'S AUTHORITY AND STATUTORY CRITERIA

The Application for fact finding noted that there were other issues still unsettled but set forth in the Application the central issues then stalemating the negotiations. At hearing the parties made presentations only on the enumerated issues.

As passed by the legislature in 1954, the statute is found at Michigan Compiled Laws 423.25 which says in part (§25) "Whenever in the course of mediation under Section 7 of Act 336 of the Public Acts of 1947 being Section 423.207 of the Compiled Laws of 1948, it shall

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[4]This was not intended to be a "mediation." Nor it an implicit criticism of the mediator – who is highly experienced, well-trained and respected in the state – and whose guidance had already helped the parties resolve many issues. Mediation by such a mediator can be sublimely effective, can empower the parties and get them past difficult issues. It is often preferred to taking a chance on the assignment of a particular Fact-Finder. In the present context, they may be working on a limited budget. Moreover, Fact-Finders are individual and not 'fungible goods' and every one of them has a different approach to an arcane art. So any fear that parties will prefer fact finding in lieu of mediation (and mediators are overworked and understaffed, so they don't lack for work) seems misplaced. Rather, it is understood that the Fact-Finder is another participant in the process – one who may make independent findings and a recommendation at a different level – and that this makes him a potentially useful tool for the voluntary resolution of the parties' conflicts. In effect, the Fact-Finder is 'a fulcrum for the levers' that are the representatives of the parties. Levers without fulcrums are always of limited effectiveness. Moreover, the court-house-step settlement of disputes on the eve of litigation is well-documented. Med-arb is doubly important in fact finding, as the Michigan fact finding statute does *not* create a tripartite panel, as it does in Act 312 interest arbitration (for police and fire), which is an important nuance in the process. What has been evolving is not "mediation to finality," to use Willard Wirtz's phrase, but what the Kagels call "med-arb to finality." Anderson, Arvid. *Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions*. Proceedings of the National Academy of Arbitrators. http://www.naarb.org/proceedings/pdfs/1974-59.pdf

become apparent to the Board that matters in disagreement between the parties might be more readily settled if the facts involved in disagreement were determined and publicly if known, the Board may make written findings with respect to the matters of disagreement." This statute was patterned after a law earlier passed by the legislature for the resolution of private public utility disputes not affecting interstate commerce through three member special commissions. The rationale of both statutes was a belief in transparency. It was thought that public disclosure of the positions of the parties and the recommendations of a third party would enable the disagreement to be more readily settled. It was believed that public knowledge of a third party's recommendations for settlement would have persuasive effect on the parties themselves and add moral suasion to the Recommendations particularly if the recommendations were given wide publicity.

In Michigan, the Fact-Finder acts alone without having Panel Delegates appointed by the parties. [5]

Fact-Finding is not arbitration. It is only advisory and nonbinding. It is not mediation where the mediator attempts to convince the parties in their enlightened self-interest to modify their positions and to effect compromises.

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[5]Delegates can provide their unique understanding and perspective on the evidence that is adduced. During executive sessions they are encouraged to prioritize amongst various demands. Thus, the panel is more likely to come up to a solution that is closer to the needs of the parties, does not violate their expectations, and avoids unacceptable solutions.

Judge Kenesaw [(Mountain)] Landis, about to leave the federal bench to become 'czar' of baseball in the backwash of the [Chicago] Black Sox scandal, inflicted the worst interest arbitration ever. He ignored the historical relationships in the construction industry and remade the wage system in Chicago. This resulted in chaos, violence, bombings and killing of policemen for the better part of a decade. The lack of a tripartite panel, and his lack of understanding of the parties' needs, were roots of this misjudgment. "The advantage stemming from information sharing works two ways: the neutral learns what the parties really want (and don't want) and they know what he intends to do. Obviously, it is of importance that the arbitrator discover how much in cents per hour each side will 'take' In fact, nothing else is as significant. It is entirely possible, however, to endure a dozen days of formal hearing without acquiring this knowledge." See Bernstein, Irving, *The Arbitration of Wages*, (Berkeley and Los Angeles: University of California Press, 1954), pps. 41-43.

Fact-Finding partakes of the nature of a quasi-judicial proceeding in that the parties make formal presentations, although no transcript of proceedings is taken. In addition to affording the parties full opportunity to make their formal presentations, through the cooperation of respective counsel and their clients, the Fact-Finder did spend a short time with each of the groups at which time he was advised as to which of the issues were the more important to the disputants. No attempt was made by the Fact-Finder to elicit their ultimate positions on the issues. Both the formal and informal sessions were of assistance to the Fact-Finder in ascertaining the areas of disagreement and the bases or rationalizations of the parties for their positions.

That the employer initiated the Fact-Finding is itself atypical, although it has become more common in the past couple of years.[6]

In its most basic sense, an arbitrator's function in interest disputes is to legislate for the parties.

Of course, a Fact-Finder only recommends. The process is an extension of he collective bargaining process, and is a search for the fairest and most equitable answer to the problem that the parties cannot themselves resolve. Effectively, it is up to the Fact-Finder to determine the reasonableness of the demands, and to recommend a new agreement (which plausibly should have been the one the parties would have come to at the bargaining table).[7]

In resolving such disputes the Fact-Finder will give consideration to a multiplicity of standards, to "mix the porridge." Internal and external comparable should be given some real

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[6]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.)*, (BNA, 2003), pp. 295-596.

[7]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.)*, (BNA, 2003), pp. 1358-1361.

weight, and serve to divine "a workable solution satisfactory to both sides."[8] Benefits issues are particularly difficult, and involve consideration of internal comparable, risk pooling, effect on take home pay, costs of administration, access to information, etc.[9] Wage patterns,[10] historical differentials, labor markets, the cost of living, the amount of a living wage, ability to pay are all metal for this forge, depending upon the particular context and their aptness to the dispute. These are items which may need to be elucidated by labor economists, testifying as expert witnesses. In the case of creation of a health care plan, benefits experts can deal with such issues as creating a formulary for prescription drugs, ways to maximize benefits relative to costs, etc.[11]

Health care provisions can be created and modified, and with certain narrow exceptions are a proper (legal) subject of collective bargaining.

It is also to be noted that fact finding in Michigan exists in the context of Act 312,

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[8]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1402

[9]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1413, 1418-1419.

[10]*But see,* Signal Five, Official Bulletin of the Ohio Sate Troopers Association, *The Elephant In the Tent, The Case Against Pattern [Bargaining].* *[http://webcache.googleusercontent.com/search?q=cache:nG_PRfvdlJQJ:www.ohiotroopers.org/files/Signal%2520Five.The%2520Elephant%2520in%2520the%2520Tent.doc+bulwarism&cd=10&hl=en&ct=clnk&gl=us]*

[11]This has been done for years in the public sector. *See for example* BOARD OF TRUSTEES OF THE UNIVERSITY OF TOLEDO and UNIVERSITY OF TOLEDO CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, and COMMUNICATION WORKERS OF AMERICA Local 4530 and UNIVERSITY OF TOLEDO POLICE PATROLMEN'S ASSOCIATION, Local No. 70 , SERB Case Nos 01-MED-10-0983, 01-MED-08-0704, and 01-MED-12-1107. [http://www.utppa.utoledo.edu/octUpdate/Toledo_Report%20of%20Fact-Finder%20(11-07-2005)_dnj.pdf] *See also, City of Rossford and Ohio Patrolmen's Benevolent Association*, SERB Case No. 02-MED-1131 and 02-MED-1132 and [http://www.serb.state.oh.us/sections/research/WEB%20FACT-FINDING/2002-MED-10-1131.pdf].

which provides for interest arbitration for police and fire personnel. There is a long standing cross fertilization between Fact Finding and Act 312.

In the latter, the panel is required to follow the statutory criteria set forth in Section 9 (MCLA 423.239) of Act 312. Article 9 reads:

> Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable
>
> (a) The lawful authority of the employer.
>
> (b) Stipulations of the parties.
>
> ©) 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 prices for good and services, commonly known as the 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 proceedings.
>
> (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.** [Emphasis added.]

There is no question that an Act 312 arbitration panel is expected to consider **all** of the Section 9 factors in making an award, at least as they are pertinent to the record made. It also should be recognized that the particular circumstances may dictate that certain criteria may be emphasized more than other criteria. But as the Michigan Supreme Court has noted in *Detroit v. DPOA*, 408 Mich 410 (1980) at 484, that since the:

> "factors are not intrinsically weighted, they cannot of themselves provide the arbitrators with an answer. It is the panel which must make the difficult decision of determining which particular factors are more important in resolving a contested issue under the singular facts of a case, although, of course, all 'applicable' factors must be considered."

Essentially, the Act 312 criteria address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as with other similarly situated public and private employees. In other words, the economic realities – for both sides and the public – of the situation must be considered.

In addition to the enumerated criteria the Legislature, in setting forth Section 9(h), incorporated criteria sometimes used by Fact-Finders in making recommendations as to collective bargaining agreements which are not specifically enumerated in Section 9.

Whether it is required, the Fact-Finder considered all of these factors, consistent with the Supreme Court's opinion in *Detroit v. DPOA*. Yet there were certain key criteria, namely, 9(c) "the financial ability of the unit of government to meet those costs," 9(e) overall compensation, and 9(h) the other factors criteria which would include the bargaining history and the general economic climate in Northeast Michigan.

Essentially, the Public Employment Relations criteria address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as with other similarly situated public and private employees. In other words, the economic realities of the situation must be considered.

The mosaic may also include, *inter alia*, historical and future comparisons and relationships to other internal bargaining units; external communities and bargaining units, prevailing wages paid in similar communities; wage settlement patterns in the public and private sectors; ability to pay; local, regional, state and national economic events and prediction; labor market rates; costs of maintaining other benefits (especially health care and retirement costs); cost of living increases; adequacy of staffing, needs and expectations of the public; tax effort;

hiring patterns; settlement patterns; and other factors applicable to the wage proposals.

The interest arbitration panel must try to establish a fair rate in the context of the historical relationship of the parties, and taking into account the labor economics concept of "orbits of coercive comparison,"[12] also called "wage contours."[13] Internal comparability is a factor: management needs to preserve its reputation and relationship with the other bargaining units with whom it negotiates.

The Fact-Finder has taken notice of the fact that this is *not* the first time that wage rates were established for the Alpena Education Association.

Additionally, it is understood that taking money back from a union, even in hard economic times, is a difficult sell for Management who must backtrack against a history of bargaining and agreements. There are also likely to be diverse political repercussions, one way or another. Wage comparisons between bargaining units, and among related groups, is inevitable. While higher wages is a goal, maintenance of employment and avoidance of layoffs is another (sometimes competing) goal for a labor organization.[14] An economic theory of a trade union requires that "the organization be assumed to maximize (or minimize) something."[15] Here maintenance of maximum employment for its members is an important goal for the Union. Maximizing benefits and benefit choices may be inconsistent with the Union's wage proposal.

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[12] Arthur M. Ross, *Trade Union Wage Policy* (Berkeley and Lost Angeles: University of California Press, 1948), Chapter III, pp. 53-70).

[13] Institutional economists remarked that unions impose wage standards. Dunlop (1957) called the standards "wage contours" and Ross (1948) called them "orbits of coercive comparisons" Bewley, Truman F., *Why Wages Don't Fall During a Recession*, page 109 (Harvard University Press, 2002) ISBN 06740o09437, 9780674009431 (pp. 527). As a practical matter there is a "labor market" analysis, and there is the "coffee shop" comparison.

[14] Reed, Albert, *The Economics of Trade Unions 3rd Ed.* (University of Chicago Press, 1989) (ISBN 0226707105, 9780226707105, 44-56, 204 pages.

[15] John T. Dunlop, *Wage Determination under Trade Unions* (New York: Macmillan Co., 1944), p. 4.

Among the criteria utilized by Fact-Finders are the bargaining history of the parties, both past and current, as well as the "art of the possible," based upon the parties' competing needs and interests, in light of the give and take of negotiations.

As Arbitrator George T. Roumell, Jr. stated, this process is about the "art of the possible," trying to replicate the settlement the parties themselves would have reached had their negotiations been successful."[16]

In other words, the concept of the art of the possible is that, in compromising, the parties would review their respective positions and attempt to reach a resolution based on the art of the possible, fully recognizing that the art of the possible is the essence of compromise and that without give and take, no compromise is possible.

Neither Management nor Labor should to come to arbitration with a list of demands, expecting to walk away with their list fully granted. Like collective bargaining, Fact-Finding is not a mechanism to get what you want, but rather a process empowering both sides to live with what they get.[17]

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[16]*County of Lake and Command Officers Association of Michigan*, MERC Case No. LO2 H-9004 (2004), where he wrote at page 4: "As Dean Theodore J. St. Antoine of the University of Michigan Law School wrote: 'the soundest approach for an outsider in resolving union-employer disputes is to try to replicate the settlement the parties themselves would have reached had their negotiations been successful." See, *County of Saginaw and Fraternal Order of Police*, MERC Case No. I90 B-0797 (1992).

[17]Some pundits have offered the general observation that 'management gets the language, and the Union gets the money.' However, as some scholars observed: "For negotiations that are at impasse most public sector collective bargaining laws require interest arbitration. Typically, the only issue remaining at impasse in public sector negotiations is the economic package, and the most common economic issue is that of wages. Because the strike is proscribed in most jurisdictions, and the labor market is imperfect, a theory of second bets has emerged in settlement of these matters. Rather than relying on market forces, the parties must rely on interest arbitrators and their applications of the institutional wage standards to the record of evidence to determine what the appropriate wage shall be." David A. Dilts; Mashaalah Rahnama-Moghadam; Tadessa Mangestus. *Institutional Wage Standards in Public Sector Interest Arbitration.* Journal of Collective Negotiations (formerly Journal of Collective Negotiations in the Public Sector) Volume 30, Number 4 / 2005, Page 339 - 348.

V. THE HEARING

The witnesses testified under oath or affirmation. Proceedings were informal, and there was full opportunity for examination and cross examination. But in a larger sense, this was an exhibit case. The prearbitration meeting was used for four purposes: (1) to encourage the parties to settle their differences and limit the scope of the hearing; (2) to direct the parties to gather together new and more informative exhibits, as the material they had at the time were infirm to provide guidance; (3) to establish the form of exhibits, including an 'executive summary'; and (4) to schedule the manner and timing of hearing.

Consequently, the Fact-Finder was inundated by scores of exhibits that make clear the severe financial constraints facing the school district, its employees, the taxpayers and the students. These all have an impact on the request for changes in wages and health care. Likewise, the Fact-Finder was provided with a wealth of information concerning the health care issue. Taken together, the record established that we need to do the best we can with substantially diminished resources – the crisis makes the need for proper resource management ever more acute.

As a personal note, I appreciate each party's efforts in preparing and presenting their case. Obviously, this was an expensive, labor intensive and time consuming effort. I wrote this opinion in the hope that they will avoid the effort, losses, consequences and risk of further dispute, and of continuing to operate without a negotiated agreement.

The Fact-Finder is appreciative of the cooperation and attitudes of the parties in the fact-finding process. If that attitude of cooperation demonstrated at the Fact-Finding hearings carries over into the future, then the prospects for more normal resolution of labor relations and employment disputes in the future at the Alpena public school district are good.

VI. THE RECORD OF THE CASE

The following findings and recommendations are offered for the parties; and public's consideration. They were arrived at pursuant to their mutual interests and concerns, in light of the record.

THE DISTRICT:

1. Alpena Public Schools, located in the northeast corner of the Lower Peninsula in the State of Michigan, is one of the largest geographic school districts in the entire state. The District covers approximately 604 square miles, which includes virtually all of Alpena County and a small portion of Presque Isle County, as well. Student population of the District is currently just under 4,300 students. Like most districts in the state, it is in a declining enrollment situation, dropping from 5,800 students fifteen years ago, to the current levels. Unfortunately, the decline is forecast to continue into the future, well beyond the duration of the Labor Agreement which is the subject of this proceeding. As indicated in Exhibit 104, the District has been losing students at the rate of about 100 per year.

2. Prior to the impact of the current fiscal situation in the state, the District was the second largest employer in the City of Alpena and Alpena County. As of the beginning of the 2009-10 school year, there were slightly over 500 employees. It is certain that by the beginning of the 2010-11 school year, that number will be significantly reduced, by attrition and layoffs, forced by both the decline in enrollment and state reduction in the foundation allowance, the primary source of educational funding.

3. Bargaining for a successor agreement began in March, 2009. There were eleven bargaining sessions, which involved both teams, and also several discussions away from the table. In September 2009, the assistance of State Mediator Tom Kreis was requested by the Employer. Mr. Kreis presided over two sessions, with some reduction in the number of issues, but no agreement. On December 14, 2009, the District requested the expedited appointment of a

Fact-Finder. After rejection of the initial list submitted by MERC, the parties received a second list, from which this Fact-Finder was appointed. With agreement of the parties, I conducted a pre-hearing conference on February 11, 2010. At the conclusion of that session, it is the position of both parties that only two substantive issues remain; health care and compensation.

THE COMPARABLES:

5. The parties agreed that the following districts should be utilized as comparables, in accordance with the provisions of PERA:

Alcona Schools	**Mio-AuSable Schools**
Atlanta Schools	**Posen Schools**
Hillman Schools	**Rogers City Schools**
Johannesburg-Lewiston Schools	**Fairview Schools**

These districts compose the coverage area of the MEA District office. All of these units are serviced out of Alpena. They are not, of course, similar in physical size to Alpena Public Schools, but are the closest to the District in terms of geographic proximity. Exhibit 116 shows the closest comparable points on the salary schedule, as well as the type and cost of health care.

DISTRICT FINANCES:

6. During the presentation of its case, the District indicated through testimony given by Diane Block, Assistant Superintendent for Operations, the question of the ability to pay was raised. Prior to discussion of the remaining issues, this requires that the question be resolved since the remaining issues obviously involve cost. Both sides, in their presentations, indicated that the District is facing several issues which directly affect the amount of financial resources the District has available.

7. The first of these is declining enrollment. Again, the parties appear to be in agreement that the District is losing students at the rate of approximately 100 per year. The present maximum foundation allowance is $7,316 per student. That equates to $731,600 lost to the District every school year. This amount would, of course, vary, depending upon the exact

count of lost students, and the exact amount of foundation allowance authorized by the State of Michigan for each school year. That is significant, because for the current school year, the allowance was reduced by $165 per student, or $721,000, at mid-year. At the present time, the exact amount of possible reductions for the 2010-2011 school year are not certain, but both parties indicate that the current amount under consideration is $433 per student. That would equal an additional reduction of approximately $1,850,000 for 2010-2011.

8. The District has pared over $500,000 mid-year from the current budget, according to the testimony of Ms. Block. Under consideration for the 2010-2011 school year are other reductions and eliminations totaling over $2,600,000. Her testimony indicated that this number does not include all possible reductions for next year. Her budget projections indicate a complete loss of fund equity and an actual deficit of over $900,000 if matters are allowed to proceed on the present course.

9. The AEA does not dispute that the district is facing some difficulty, but states that there are difficult decisions which must be made, and in the face of the declining enrollment, they would necessarily include a reduction of personnel, and more specifically teachers. They also argue that Ms. Block is a conservative budget maker and that her projections will not be as bad as indicated in her testimony and exhibits. However, as evidenced in their presentation, Ms. Block's conservative budgeting has resulted in about a variation of less than 10% in the amount of fund equity which remains, versus her forecast. That is not enough conservatism to overcome an almost $4.5 million hole in the budget.

10. I am inclined to agree with the AEA that difficult decisions must and will be made, including force reductions. However, I do have concerns over what will remain available to the District in terms of fund equity, and I am not necessarily inclined to add to the budget deficit and therefore increase the number of layoffs necessary to achieve balance, which will add to high unemployment figures (circa 20% for the official count) for Northeast Michigan.

HEALTH INSURANCE:

11, As is common throughout not only Michigan, but this entire country, the issue of health care coverage plays a significant role in these negotiations, as it does in every negotiation. As inflation increases in single digits, health care increases in double digits.

12. The AEA proposed that MESSA insurance be provided to all members of the unit. As the Fact-Finder is aware, the issue of policyholder status is significant.[18][19]

13. The Board of Education has long had, as part of its by-laws, (see Exhibit 112) a provision that the Board will be the policyholder of the District's group insurance program. And, of course, PERA , in Sec. 15 (3) (a) (see Exhibit 111) states:

> 3. Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
> (a). who is or will be the policyholder of an employee group insurance

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[18]On December 15, 2009 Fact-Finder Stuart M. Israel issued his recommendation in MERC Case No.D08 C-0341, Flint Community Schools and United Teachers of Flint, Inc. MEA/NEA, in which he wrote:
"Here, the Board of Education decided that the District will be the healthcare policyholder. The District asserts that this decision is its exclusive prerogative under PERA and that UTF is prohibited from making that decision a bargaining subject. UTF does not seem to disagree with the District's reading of the law but, nonetheless, proposes resumption of MESSA healthcare. The difficulty with UTF's proposal is that it seems that MESSA will not agree to provide its healthcare program in the District unless MESSA is the policyholder. The District writes that "MESSA only offers group insurance benefits," underwritten by insurers, "for which MESSA itself is the policyholder." UTF does not seem to disagree with this either. Nor did the MESSA witnesses called at the hearing by UTF. Thus, the fundamental difference between the parties over MESSA versus HealthPlus is not an ordinary bargaining difference, or impasse. It is a difference over a statutorily "prohibited" bargaining subject, addressing a matter that by law is within the District's "sole authority. . . . The MESSA factor, as discussed, forecloses UTF's healthcare proposal, leaving the District's proposal as the only viable healthcare proposal presented."

[19]On September 29, 2008 Fact-Finder Donald Burkholder, in MERC Case No.L07 B-9016, Leslie Public Schools wrote: "It is not the role of a fact-Finder to recommend whether the employer or the MESSA has or ought to have policyholder status, or whether a specific insuring organization, *e.g.*, MESSA, should continue to be the insurer. Section 15 (3)(a) and (4) of PERA states that who is or will be the policyholder of an employees group insurance benefit is a prohibited subject of bargaining. Fact-finding's purpose is to identify and recommend measures which would expedite bargaining."

benefit.

14. At the pre-hearing exchange and discussion, the District emphatically indicated to the Fact-Finder that this position will not be relinquished, and that any further discussion of MESSA health care is "inappropriate and prohibited."

15. At the pre-hearing conference there was considerable discussion over the MESSA proposal by the AEA. The AEA has maintained that the MESSA proposal is actually cheaper than the coverage proposed by the District, which was disputed by the District. As a result of that discussion the Board agreed to let out a request for proposal to various health care providers. That was completed and the results were transmitted to the AEA.

16. Mr. Herring, MEA Uniserv Director, presented a number of exhibits regarding MESSA, including a comparison of coverage and also a comparison of cost. The benefit levels under the MESSA proposal would increase slightly for some coverages. Upon cross examination it was determined that the MESSA proposal was for the period expiring June 30, 2010. The Request for Proposal requested that the quote be effective July 1, 2010. Both parties agreed that the current estimate of increase likely to be effective July 1, 2010 is 13%. This results in the cost of MESSA being approximately $48,000 higher for the year.

17. The District proposes that the health care coverage be changed to PPO2, which includes a $100/$200 deductible, $20/$25 Office visits, and a co-pay of 10%. The District is not proposing any premium share on the part of the AEA members. The parties appear to agree on the cost of the PPO2 coverage. The District pointed out that all of its other employees currently have PPO2. The AEA exhibit also indicates that this is the case, but argues that coverage is not exactly the same. A review of the exhibits seems to indicate that the health care coverage is substantially the same, but ancillary benefits and premium sharing is different.

18. The AEA is the only Alpena employee group not covered by PPO2.

19. The Association compared the Blue Cross/Blue Shield Plan to the MESSA

Plan and found the following differences in Exhibit 4:

MESSA	**Blue Cross/Blue Shield**
Choices II	**Community Blue PPO Plan 2**
Up to one year coverage without cost to employer or employee for layoff or privatization	Not available
Health insurance paid for up to two years while on LTD	Not available
$5,000 life insurance included with health insurance	Not available
Chiropractic: 38 visits/yr	Chiropractic: 24 visits/yr
Over age dependent eligibility: 19-25 with 51% dependency 25+ and unmarried full-time student covered	Over age dependent eligibility: Not available without rider IRS dependency required Not available after 25 years of age
Preventive Care: No caps	Preventive Care: Capped at $500/member/year
Office Calls: $5.00	Office Calls: $20.00
Urgent Care: $10.00	Urgent care: $10.00
Emergency Room: $25.00	Emergency Room: $50.00
Ambulance: 100%	Ambulance: 90% after deductible
Deductibles: None	Deductibles: $100/$200
Percent Co pays: None	Percent Co pays: 10% for general services 50% for mental health
Co-pay Maximums: No co pays, therefore, no maximums	Co-pay Maximums: $500/member/year $1,000/2-person and full family/year
Dollar Maximums: None	Dollar Maximums: $1 million transplants $5 million/lifetime for all other services

20. The above demonstrates that the out-of-pocket expenses for an association member on Community Blue PPO Plan 2 is greater than the Association's MESSA Choices II insurance proposal. The Association's insurance proposal, does not create any additional expenses for an Association member. In fact, MESSA Choices II reduces the out-of-pocket expenses for Alpena Education Association members. The present Community Blue PPO Plan 1 as well as the Board proposed PPO Plan 2 has a $10.00 office call, $50.00 emergency room, dollar maximums and 50% co-pay on mental health/substance abuse versus MESSA's $5.00 office call, $25.00 emergency room, no dollar maximums, and 100% coverage for mental health/substance abuse. The MESSA layoff coverage for up to one year of health insurance and LTD health benefit for up to two years of health insurance are huge benefits to a member/family when layoff or serious health issues arise resulting from job loss or health leave. The qualify for free medical insurance at no cost to the district or member.

21. The above Community Blue PPO Plan 2 does not include an Rx card. Instead, the Alpena Public Schools has elected to self-fund their own drug card.

22. The Alpena Public Schools Rx card allows purchases at only four locations in the city or the hospital at $10 per script. If anything is purchased at any location other than the aforementioned five (5), the script cost increases to $20 per script. This is expensive as well as inconvenient, particularly when traveling out of town for long periods or while at college.

23. The MESSA plan is a $10/$20 plan as well, but allows the members to purchase their drugs at any pharmacy anywhere.

24. Of the seven comparable schools addressed in this Fact-Finding, seven have MESSA Choices II health insurance. Some are flush with money and others not. All the districts have fund equities greater than (Alcona, Hillman, Mio and Rogers City) or less than (Atlanta, Johannesburg-Lewiston and Posen) Alpena's 12%. None have brought to the table another insurance plan so long as this UniServ Director has been in position (15 years). (Exhibit 2)

25. 100% of the comparables have selected MESSA as their insurance provider. All the comparable districts are smaller than Alpena, yet find the plan and its cost satisfactory. In fact, Rogers City administrators just switched from a high deductible BC/BS plan (July, 2010) to MESSA Choices II because the rates were better. Bottom line: MESSA's product is better bang-for-the-buck than Blue Cross/Blue Shield Community Blue PPO Plan 2.

26. Based on this record, none of these comparable districts took the position that they wish to be the policyholder of the insurance coverage.

27. The average cost for the comparable districts is $1421 per month, considerably higher than whichever MESSA quote for Alpena Public schools is utilized. The quote obtained by the AEA is $1137 per month , and the quote obtained by APS is $1210 per month, which eliminates the cost savings the AEA has emphasized

28. Alpena Public Schools expends less on insurances than the external comparables. In fact, Alpena spends an average of 2.5% less than the seven comparable external schools. If we were to use the rate of the present insurance coverage ($269,683.50/month) and multiply it by the 2.5% difference we come up with an additional $6,742.00/month. To place Alpena in the middle of the external comparable schools would necessitate increasing Alpena Public Schools' contribution to teacher insurance by $6,742.00/month. If we were to add this amount to the Board's suggested Community Blue PPO Plan 2 rate of $279,283.78/month (including the 17+% increase for the 2010-11 school year), we come up with $286,025.78/month. MESSA's 2009-10 projected rate increased of 13% (state average) comes in at $283,689.22/month. This is well within the boundaries of the external comparables. (Exhibit 2)

29. The Alpena Public Schools spends less on teachers' insurance than it does on the other internal comparables. The Union concedes that the operations/maintenance and transportation ratios are skewed due to lower overall wages. However, the administrative wages are substantially higher than the teachers' wages demonstrating that though the teachers have

lower wages they also have a lesser amount expended on their fringe benefits. (Exhibit 2)

30. Doing the same with the external comparables with the ratio of insurance to wages of the internal comparables (administration and teachers), the following may be observed: This year's present cost of insurance is again $269,683.50 per month. Instruction gets .144 of their total compensation as insurance. Administration gets .180 of their total compensation as insurance. If instruction had the same ratio as the administration, the pie would have to be increased by .036 or $269,683.50 x .036. This results in an increase of $9,708.61 per month. $9,708.61 added to the Blue Cross/Blue Shield PPO Plan 2 rate for 2010-11 yields $288,992.39. MESSA's 2009-10 projected rate increased of 13% (state average) comes in at $283,689.22 per month. This is well within the boundaries of the external comparables.

31. Comparisons of external comparables (seven local districts) and internal comparables (Instruction versus Administration) demonstrated with equal (internal) or average spending (external) of the comparables puts MESSA in the ballpark. (Exhibit 2)

32. The Alpena Public Schools is presently spending $269,683.50 per month for BC/BS Community Blue PPO Plan 1. The Alpena Education Association is suggesting MESSA Choices II with a $10/$20 Rx for $283,689.22 (estimated 2010-11 rate at 13% increase over 2009-10) per month for PAK A (including health, dental, vision, life, and LTD) and PAK B (including dental, vision, life and LTD) for those not taking health insurance.

33. The district is seeking to move the teacher bargaining unit to BC/BS Community Blue PPO Plan 2 with increased office calls and 10% co-pays for $279,273.78 per month (including health, dental, vision, life and LTD and in lieu payments for those not taking health insurance).

34. In 2008-09, Alpena Public Schools was spending per month for Community Blue PPO Plan 1 health with $10.00 office calls, $50.00 emergency room, self-funded $10/$20 Rx, self-funded dental, vision, life, LTD and $45.00/month in lieu for those not taking health

insurance.

35. In 2009-10, Alpena Public Schools was spending per month for Community Blue PPO Plan 1 health insurance plan with $10.00 office calls, $50.00 emergency room, self-funded $10/$20 Rx, self-funded dental, vision, life, LTD and $45.00/month in lieu for those not taking health insurance.

36. MESSA provided Alpena Public Schools a 2009-10 rate of per month for Choices II health with a $10/$20 Rx, improved dental, improved vision, life, and LTD (PAK A) and for those not taking health insurance; dental, vision life, and LTD (PAK B).

37. Blue Cross/Blue Shield then gave Alpena Public Schools its rate increase for 2010-11: 10% for single, 17% for two-person, and 18% for full family. This then brought up the Blue Cross-Blue Shield Community Blue PPO Plan 2 insurance to with dental, vision, life, $45.00/month in lieu for those not taking health per month.

38. MESSA will not be releasing its individual district rates until the 19th of April,[20] but has released its statewide increase of 13%. Utilizing the 13% rate for Choices II health with $10/$20 Rx improved dental, improved vision, life, and LTD (PAK A) and for those not taking health insurance; dental, vision, life and LTD (PAK B), the rate increases to $42,985.28 represents the cost difference per year between MESSA Choices II and Community Blue PPO Plan 2. This represents .3 of a 1% raise on the salary schedule. Putting this money into benefits rather than wages not only saves the district the cost of FICA, retirement, and state taxes, but also saves the Association members payroll taxes, increased costs of deductibles, and co-pays. The Association is willing to reduce its wage increase by .3 of a percent to eliminate the potential hits created by increased deductibles and co-pays. With dollars spent on the MESSA insurance plan, the district will be saving up to $.30 per dollar by not having to pay the mandated

[20]The parties should now have a more reliable figure as to cost for the coming year than the estimate given the Fact-Finder. This would include the costs of MESSA Choices II.

costs associated with paying cash. The Association states: "This is truly a win-win for both sides."

39. If the additional of the MESSA package is $42,985.28, it could be made up with an appropriate .3% wage adjustment.

40. Issue number two is the question of policyholder. At the hearing, the District Consultant raised objection to the inclusion of any MESSA data or presentation. He relies upon the PERA prohibition on discussion of who will be the policyholder of the insurance benefit package for any employer.

41. It is undisputed that the AEA is the lone employee group not covered by PPO2. Internal comparability and ease of administration is important. It is a fact that the Board's policy on being self insured has been on the books for at least 20 years.

WAGES:

The Board proposes: **2009-10 ½% + steps + columns**
2010-11 $500 off schedule
Neither steps nor columns

The Association proposes: 2% on all monies for 2009-10 and 2010-11 school years.

42. A brief history of this most recent round of negotiations involving all units of the District will serve to explain the current Board position. There have been two Steelworker represented units and two MESPA represented units which have reached agreement. As part of all these negotiations, the District position has consistently been that a change to a lower cost of health care coverage is necessary. Further, any savings generated by such change would be used, in part, to increase wages to help offset the cost of these new deductibles and co-pays. Unfortunately, as negotiations have progressed, the financial situation of the state, and the district, has regressed. This resulted in lesser amounts of wage increases being applied to those units who bargained later.

43. However, as in the other units, the Board offered the AEA unit a wage increase in the first year of the proposed agreement which was specifically tied to the adoption of PPO2. The rationale for the proposal was that some of the savings would be used to fund the

increase in the first year of the proposed agreement which was specifically tied to the adoption of PPO2. The rationale for the proposal was that some of the savings would be used to fund the wage aspect of the proposal. That proposal was obviously not accepted, and we are now nearing the end of the school and fiscal year, and those savings are no longer available.

44. In addition to the above loss of savings, the financial condition of the District has deteriorated. As pointed out in Exhibit 104, the District continue to lose students at the rate of about 95 per year. That results in a loss of state revenue of approximately $695,000 per year. The Governor has indicated that the loss of $165 per student, first applied to the current school year, will become a permanent reduction, or another loss of $700,000 per year (4288 students x $165). The Governor's 2010-11 recommendations do include the continuation of this reduction as does the one submitted by the Senate Fiscal Agency. However, preliminary indications are that these proposals may be optimistic, and that additional reductions of up to $268 per student are being quietly discussed in Lansing. These reductions, both permanent and considered, as well as the ever-increasing costs facing the district, have created a financial tsunami which will result in building closures and force reductions, at a minimum. (The Board has already taken action to close two elementary schools at the end of the current school year.) Employer Exhibit 107 shows the proposed cuts and closures which were submitted as of November 2009. As indicated, for this school year they total over $750,000 and for 2010-11, they approach a staggering $2.7 million dollars.

45. Exhibit 106 shows that the anticipated fund balance after 2009-10 will be $2.7 million dollars. This is quite a significant departure from a previous fund balance of $10 million as recently as the 03-04 school year, as shown in Exhibit 102. While a $2.7 million fund balance may appear to be significant, it must be noted that the District operates numerous buildings, buses children in from all over the geographic area of the county, and has over 400 employees, with health care and other benefit costs. The anticipated fund balance does not even

cover one month of expenses, and is considerably lower than the standard accounting recommendations.

46. The governor has also proposed an increase of about 2% in retirement costs that the District is expected to cover. As of the hearing, the fate of the proposal was undetermined.

47. It is proper that we also look at the wages being paid to those districts which we have agreed are comparable. Exhibit 116 sets forth comparable wage information, as gleaned from the contracts covering the various districts. Not all wage schedules are exactly comparable, as some may contain other columns or steps. In the comparison , we have attempted to include those salaries most closely comparable to the BA 30 or MA schedules and the MA 30 schedules. As noted therein, the average for the BA 30 or MA scale is $56,888, which is about $7,200 less than what Alpena Public Schools pays. With respect to the MA 30 rate, the average is $60,865, and the Alpena salary is $67,131, or approximately $6,200 higher than the average.

48. Exhibit 119 is a list of all teachers in the district, and reflects their W-2 earnings for the 2009 calendar year. At the end of the listing, there is an average compiled. The "Y" average calculates the average yearly compensation for full-time teachers in the district. As indicated, that average is $66,046 per year. Including the cost of mandatory benefits (27.41%, which includes retirement, FICA, workers compensation), and the cost of insurance and other benefits, which we have ball-parked at $15,000, the cost to the District of the average teacher is approximately $99,100 per year.

49. The seven external comparable school districts average a 1.66% increase in wages for 2009-10. Only two external comparables are settled for 2010-11 and they average 1.5% increases in wages. (Exhibit 3)

50. The internal comparables (Steelworkers: Three 2%'s; Alpena ESP I: 1.5% and two 0%'s; Alpena ESP II: 1.5% and 1.0%) have an average wage settlement of 1.5%. This

includes one unit (Alpena ESP I drivers) that took a zero to provide new dental, vision and life insurance coverage for the 2009-10 and 2010-11 school years for those members not eligible for health insurance. The administration will get the same percent increase as the teacher unit and is not included in the calculations. (Exhibit 3).

51. The Union disputes the "ability to pay argument" being claimed by the district. They note that budgets and projections of the District have been unduly pessimistic, missing the audited fund balance by $700,000 in favor of the district over the last six (6) years. (Exhibit 2)

52. The wages offered by the district (½% and $500.00 off schedule) will not offset the deductibles mandated by the Blue Cross/Blue Shield Community Blue PPO Plan 2. (Exhibit 4)

53. The employer tried to discount the Association's slide showing the insurance cost as a percent of revenue. However, their Exhibit 120 utilized the W-2 wages of all the Alpena Public School employees. They compared the W-2 wages (salary and extra duties, longevity, and any other payments received by the district) to the salary only of the other comparable schools. The W-2 wages also reflect a 27th paycheck that was issued on December 31, 2009, instead of January 1, 2010. This again inflates the average reported by the Board team.

54. Employer's Exhibit 111 has disputed validity. The rate for Blue Cross/Blue Shield health insurance has very little meaning in this fact-finding. Because Alpena Public Schools is self-funding the policy, they need to include administrative fees, stop loss insurance costs, local administrative costs (Diane Block stated in bargaining that up to 12 pairs of hands deal with the insurance claims) as well as the cost for dental, vision, life, LTD and their administrative fees and handling costs.

VII. DISCUSSION AND RECOMMENDATIONS

A brief history of this most recent round of negotiations involving all units of the District will serve to explain the current Board position. There have been two Steelworker represented units and two MESPA represented units which have reached agreement. As part of all these negotiations, the District position has consistently been that a change to a lower cost of health care coverage is necessary. Further, any savings generated by such change would be used, in part, to increase wages to help offset the cost of these new deductibles and co-pays. Unfortunately, as negotiations have progressed, the financial situation of the state, and the district, has regressed. This resulted in lesser amounts of wage increases being applied to those units who bargained later.

However, as in the other units, the Board offered the AEA unit a wage increase in the first year of the proposed agreement which was specifically tied to the adoption of PPO2. Again, the rationale for the proposal was that some of the savings would be used to fund the wage aspect of the proposal. That proposal was obviously not accepted, and we are now nearing the end of the school and fiscal year, and those savings are no longer available.

In passing, I note that there is a basic conservatism of Act 312 arbitrators. It has long been recognized that the bargaining table is the preferred place to make fundamental changes. But this is not an Act 312. I can't make the decision for the parties. My only power is to find facts and make a recommendation, and they will have to pass on it themselves. They will implement what they will at they bargaining table.

Merely declaring a winner will not resolve the problem.

But both sides are wrong.

Both parties have given an ultimatum. If each does not get it wants, there will be no agreement. As a bargaining lever, this leaves the Fact-Finder without guidance. Neither

party's position is favored, as one or the other will certainly veto (irrespective of the recommendation). Thus, cooperation is not expected. This is a form of "the prisoner's dilemma", which is "a fundamental problem in game theory that demonstrates why two people might not cooperate even if it is in both their best interests to do so."[21]

So be it. I do not have to live with the consequences, and they do.

Neither of them will get what they want from the Fact-Finder.

As an initial and foundational consideration, 1% on the base of this bargaining units wages, including roll up costs, costs approximately $182,000.00 +/-)

As one will discern from the bargaining history, the negotiations appear to be a lot like this fact finding. Two blacked-out ships passing on a moonless night.

The consequence is that there have been lost opportunities. We have a stalemate. Neither party achieved any of its long term goals. Both were locked into positions. Neither would move. Neither would give ground on the two overriding issues, and there has been a resolve that looks like stubbornness. While I am not deciding an unfair labor practice charge, it would be easy for the critical to characterize one or both of their conduct as "Boulwarism."[22]

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[21]It was originally framed by Merrill Flood and Melvin Dresher working at RAND in 1950. Albert W. Tucker formalized the game with prison sentence payoffs and gave it the "prisoner's dilemma" name (Poundstone, 1992). *See* Wikipedia, "Prisoner's Dilemma" http://en.wikipedia.org/wiki/Prisoner%27s_dilemma

[22]**"Boulwarism.** A collective bargaining approach followed by General Electric Company, and named after its vice president for employee and public relations, Lemuel Boulware. It was described by Professor Herbert Northrup as follows: 'After careful research, and a full exchange of views with the union bargaining agents for many days, or even weeks before an offer is made the company puts what it believes proper on the table and changes it only on the basis of what is considered new information.'
It was described in detail by NLRB trial examiner Arthur Leff as embracing the following:
(1) The same basic offer is made to substantially all of the unions with which the company negotiates.
(2) The company, however, does not initially present its offer on a 'take-it-or-leave-it' basis. It states 'a willingness to make prompt adjustments whenever (but only when) new information from any source or a significant change in facts indicates that its initial offer fell short of being right.' But the company also emphasizes that 'it will not make any change it believes to be

In any event, when this dispute is resolved through collective bargaining, that will become irrelevant. We need to fix the problem, not fix the blame.

It is a fact that the parties have lost a whole year because of an inability to come to a shared understanding. This had real adverse economic consequences for both parties. The employer suggests that its offer is negative reinforcement for the Association's resolve. While that may be one way to look at it, the fact is that there were economic opportunities for both which are now 'water over the dam' and cannot be recovered. It is respectfully suggested that the parties cut their losses and move on with their lives and running their operations for the good of their constituencies.

The Fact-Finder also bears in mind that the employer is trying to balance the books in an adverse economy. Economic forecasts are not looking appreciably better in the short term. The Employer needs to operate within its budgetary abilities. Not only is it wrong to run a deficit, a diminished fund balance makes operations more difficult and more expensive.

Moreover, both the state's and district's circumstances have only deteriorated in

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incorrect because of a strike or a threat of a strike. . . .'
(3) As a part of the approach, the company 'markets' its positions directly to the employees through 'an elaborate employee communications system, making use of plant newspapers, daily news digests, employee bulletins, letters to employees' homes, television and radio broadcasts, and other media of mass communication, as well as personal contacts.' It is he company's belief that the employees, in turn, may influence union acceptance of the offer.
(4) Finally, it is the company's policy to make certain that no union receives favored treatment.
"Moreover, it applies the terms of the basic offer made to the unions to the employees who are not represented by a union.
"Source references: *General Electric Co.*, 150 NLRB 192, 57 LRRM 1491 (1964); Lemuel R. Boulware, *The Truth About Boulwarism* (Washington D.C.: BNA, 1969; Morris D. Forbosch, "Take It or Leave It as a Bargaining Technique," *LLJ*, Nov. 19o7; Kenneth A. Housman, "Final Offer Selection: An Arbitration Technique," *Personnel Administration*, Jan./Feb. 1972; James W. Kuhn, "A New Glance at Boulwarism: The Significance of the GE Strike," *LLJ*, Sept. 1970; Herbert B. Northrup, *Boulwarism*, (Ann Arbor: Univ. Of Michigan, 'Bureau of IR, 1964; _____, "Boulwarism vs. Coalitionism – The 1966 GE Negotiations," *Management of Personnel quarterly*, Summer, 1966; _____, "The Case for Boulwarism," *Harvard BR*, Sept./Oct. 1963. See also GENERAL ELECTRIC CASE."" Roberts, Harold S. *Roberts' Dictionary of Industrial Relations 3rd Ed.* (Washington D.C., Bureau of National Affairs, 1986), pp. 76-77.

the meantime.

Unfunded mandates,[23] the problems posed by diminished revenues (tax base, Headlee, Proposal A), diminished revenue sharing, the lack of a coherent state legislative solution[24] and the potential foreseeable impending commercial real estate valuation decline are among these realities. It is also understood that decreased state revenue sharing is an everyday fact of life. Indeed, the utter unpredictability of state revenue sharing and support for foundation grants, where it is here promised for the fiscal year, delivered late, and reduced without warning in mid-year, is a fiscal nightmare for the District.

The District is suffering from declining property tax revenues from a declining valuation of realty. It is being required to carry so-called 'unfunded mandates' from both the state and federal governments.[25]

It is not a question of 'punishment' but is instead a recognition of diminished ability to pay.

The Association has tread a fine line around Act 112. So has the Fact-Finder.

Both sides have tended to 'hold their cards close to their chest,' which does not create an ideal climate for negotiations. Indeed, the lack of effective exchanges of meaningful and pertinent information continues to this day.

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[23]The *Final Report of the Legislative Commission on Statutory Mandates* released December 31, 2009, found that over $2.2 billion dollars in unconstitutional unfunded state mandates existed. These are mandates made by the State which local governments are Constitutionally not required to bear, but do so because the State is emboldened by the disproportionately small number of suits to hold it accountable to the Constitution, Article 9, section 29.
See http://council.legislature.mi.gov/lcsm.html

[24]On the 14th of April, 2010 the State Senate passed a bill that would reduce the employer's retirement obligation to the State retirement system by 2%. This has not passed the full legislature, but neither has any budget plans for the 2010-11 school aid funding.

[25]While it is easy for Congress to declare that "No Child Left Behind", it would have been nice if they provided the funds to make it happen and offset the costs of paperwork.

Health care is a serious issue, rather like a heart attack. It is not just a management obligation; nor is it just a union right. It is a vital personal concern to the employees. We are talking about "Fringe benefits" which have become so overwhelming and pervasive that no one – not the employer or the employees – can afford them (or afford to be without them).

However, it is a benefit that is earned. Concurrent with that, individual employees have an obligation to themselves to see that their health dollars are wisely spent.

The district also has an institutional obligation to the public to see that their health dollars are wisely spent. In short, we are seeking 'the best bang for the buck."]

Health insurance is one of the single largest budget items.

In light of all this, the Fact-Finder endorses in this case a partnership theory on the question of health care. Both sides should share in the decision making. Both sides should share in the costs. Both sides should share in the benefits.

In part, like King Canute, we are resisting the wave of the future – larger copays, premium sharing and deductibles. This has happened in the private sector, and its is coming in the public sector.

In looking at this plan, it must be kept in mind that catastrophic health care coverage plans are no panacea. It is a fact that workers can have health insurance (which at least gives them access to more favorable prices for health care than if they tried to negotiate it themselves), and then go bankrupt due to health care costs. It is a fact that we are all just one illness away from having to file bankruptcy.

46% of all personal bankruptcies were due in large part to medical expenses. 70% of those had health insurance. The most direct way in which the insured are affected by the lack of universal health care is illustrated by a 2005 study that surveyed people who filed for personal bankruptcy. In this study, 46.2% of those surveyed cited a medical cause for their

bankruptcy. Of note, only 32.6% of those citing a medical cause of bankruptcy were uninsured at the time of filing, meaning that almost 7 out of 10 people in the survey were insured when they filed. In other words, high medical bills and lôst income due to illness can lead to bankruptcy even for the insured. A society that believes that people should pay a lot of money for the privilege of having health care is a society in which only the extraordinarily rich are truly immune to the threat of medical bankruptcy.[26]

On the expenditure side, perhaps the largest and essentially uncontrollable problem for employers is the increased Health Care costs for pensioners.[27] This was not addressed by the parties in their presentations, but it is a fact that I will not ignore.

The parties are 'in the lifeboat on the storm-tossed sea. Both parties are intent in rowing on opposite directions.'

There has been a difficulty getting down to figures that are meaningful. The process is burdened by obfuscation and lack of meaningful and forthright data for comparison. This is a sitution of "Garbage In, Garbage Out (GIGO)".

The Employer's figures are slippery.

MESSA figures are closely held, and do not absolutely tie to the future.

Part of the complaint about MESSA is that it is nonprofit, and that it tends to treat past good claims experience as a reason to increase insurance coverage, and not to decrease rates.

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[26]Kao-Ping Chua, *The Case for Universal Health Care* and authorities cited therein. http://www.amsa.org/uhc/CaseForUHC.pdf.

[27]Two overriding issues in health care are: (1) double digit increases in health care costs, while the cost of living goes up in the low single digits; and (2) legacy costs, that is, the need to pay for the health care costs of present and future retirees. A large portion of the record in the police case dealt with the intricacies of the new Government Accounting Standards Board (GASB) Rule 45, which now requires government to recognize on its balance sheets the projected costs of these liabilities. While the rule did not create new liabilities, it did require that they be more prominently stated. Typically in the new millennium, retiree health care costs have soared, with further increases reasonably anticipated going forward.

That appears to be a fair criticism, and is part of outward hostility (in some quarters) and some larger issues presented by critics. I do not share those opinions, but one does not have to be a weatherman to recognize the climate.

Comparison of fully insured plans and illustrated rates is slippery slope.

Management can determine its exposure, or at least limit it by purchasing various stop loss coverage.

The rate that is being quoted by Blue Cross/Blue Shield to Management is an "illustrated rate" based upon its being experience- rated and self-insured. The Employer gets money back, based upon good experience. It does not know how much it has saved or received in rebates, and is in no position to project it in the future. It is to be noted that the a self insured employer, like the Alpena Schools, is by law quoted an "illustrated rate," not a "premium." This is because the contracts it has been purchasing are not "insurance" (except for the 'stop loss' coverage), but are a set of interlocking promises to pay for its own coverage, based upon actual experience, plus an administrative fee to the Third Party Administrator.

Actuaries and professional testimony were needed, and the record on this is thin,. It is completely absent from the employer's cases; and largely missing from the Association's presentation.

The mere suspicion of the Board's operating officer about the rates does not change that fact. Indeed, Ms. Block acknowledged that it was a far better product, while opining that it can't possibly cost what they are claiming. The Fact-Finder disagrees. In any event, the total recommendation, including the wage package, is intended to offset those costs during the present contract.

As I have indicated, there is a plausible argument that administrative convenience, that is one system for all employees, is a reason to go with its proposal. Management has the future problem that it does not want to break faith with the other bargaining units it negotiates

with, and it does not want to set a future precedent that will be used to whip saw it in future negotiations.

Further, it must be remembered that the employer's self insuring is the status quo. If the Association wants a change from the past, it ought to buy it. In collective bargaining most everything is for sale.

But all of that aside, MESSA is a better product. It is available to teachers, MESPA members, and the district's administrators. But if the Union wants MESSA so badly, it should pay for the upgrade.

In short, I recommend that the Association's proposal on health care be adopted.

Therefore, I recommend a two year contract, retroactive to the expiration of the last contract. I recommend a one percent pay increase on the base, in the middle of the second year.

I recognize that the economic situation has dramatically been altered in this state and this District. However, I do not think it has become necessary to eliminate any type of additional compensation. A quick perusal of the salary schedule shows that the steps of progression carry with them a fairly significant amount of increase. I do not think I should recommend any agreement that eliminates their progression through the salary scale. This is a previously bargained right that even MERC has sustained; it is essential to maintaining stability in the work force, and to fulfilling contractual expectations based on longevity and professional educational attainments that are already bought and paid for (and which help enhance the classroom and performance of the District).

We must, however, also carefully consider those individuals who appear at the top of the scales. A review of the comparables clearly shows that AEA members enjoy a significantly higher amount of compensation than their counterparts in the region. That difference appears to be approximately $7,000 per year. I do not think that can be ignored . The District proposal of an

off-schedule payment will not alter the AEA's position with respect to the comparables. They will still be at the top, but the gap will be a little narrower.

Accordingly, I recommend that the second year of the agreement provides movement on the salary schedule, for those unit members still on the step progression. I would also recommend that lateral movement be permitted. Those achieving advanced education should have their efforts recognized.

Finally, on the issue of a third year, I think that the parties should strongly think of a way to make it happen. They should bear in mind the potential effect of pending legislation regarding public employment health care: as proposed it included a requirement for a 20% copay. This would have an exemption for existing CBAs. But it seems likely that the safe harbor would exist only if there was an agreement in place. Thus, if I were in a position to make the final decision, I would make the contract term for as long as feasible. Two years forward is the minimum that I would go for, and I would think that longer would be better for all concerned. I make this suggestion in the further context that the District needs an end to strife. Being constantly in negotiations (we would be in it again soon if it is only for two years) is bad for morale, makes budgeting more difficult and lends an air of instability to everything.

Because of the time frames in which health insurance could become available, there is a serious urgency for the parties to confer and come to an agreement. If nothing is done, the window of opportunity will irrevocably close. The parties are invited to take into account the latest pertinent information, some of which was not available at the time of the Fact-Finding hearing: if the information changes, then the result should be adjusted accordingly. To do nothing is to decide.

VIII. GENERAL CONCLUSION

As a personal note, both parties put together studious presentations, truly remarkable in their breadth given the time pressures. This helped understanding their positions,

and the import of the ample record.

It was my task to find and make principled recommendations based upon facts. Both sides would have me find their facts dominant. But truth here is not black and white. Settlement patterns, financial circumstances of the District and the employees, and costs of inflation are all relevant.

The District is faced with the necessity of financial constraint. There is no need to recite these overwhelming facts again.

Notwithstanding, the understandable expectations of these employees, and their ongoing economic well being, cannot be ignored forever. The Board of Education is expected to make all efforts and cuts necessary to finance reasonable wages and benefits. It needs to address the reasonable request for better health care, even as the employee's pay to make the change, due in part to the serious financial situation facing the District.

We do not see such differences either as to economics or philosophy so profound that they are insoluble. Certainly the issues submitted to the Fact-Finder present no real unique problems – no great confrontation of principle that should embolden either party to challenge the other at the risk of a stalemate of negotiations and to the detriment of the education process.

In brief, we see nothing here that shouldn't be resolved and resolved rather quickly, by parties who are motivated to reach an agreement and who, in the conduct with each other and with the mediator, will engage in good faith collective bargaining.

The Fact-Finder is confident that the parties with the assistance of their able counsel can bring the long contract dispute to early conclusion.

The parties are on dead-center now. They easily can become discouraged, and while highly motivated to settle, might find it very difficult themselves to frame compromises without loss of face or bargaining position. Not all labor disputes settle; some drift along rudderless and are never resolved. This dispute could be one of those, for the duration of

negotiations has been a very considerable, and the parties have painted themselves into a corner.[28]

One must not be impatiently critical, or unsympathetic to the real difficulties the parties have. Administrators, faculty and Union leadership are highly intelligent and trained people; they think they have a contribution to make in all areas of district decision-making They are highly motivated. They have strongly-held convictions, and do not find it easy to adjust to the give-and-take, the necessary compromises of collective bargaining.

A new relationship can be developed through collective bargaining. One would be foolish to do other than to recognize the realities of the situation. There is a question of power, not power for itself but power for what it will do for the Employer, the District, the Association, and the parties and the individuals involved. Changes of power positions or modifications of power settings do not come easily in any collective bargaining situation . A settlement here will not come easily. It will take not only the greatest skill but the highest resolve for settlement. The Fact-Finder strongly believes that if the parties see fit to take a long look at the Recommendations, they may be able to revisit, give, take and compromise on the pivotal issues,

Fundamentally, what is desirable and what is attempted in the recommendation is to insure meaningful participation by the Association with ultimate power of decision-making with the District, but with an assurance of procedural regularity and fair play.

Although the foregoing determinations are not necessarily the only solutions to the problems the parties' mutually confront, the Fact-Finder finds they are most in conformity

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[28]Normal procedures indicate that if the two sides can not reach a contract agreement within 60 days of receiving the opinion, the school board could implement its last contract offer without approval of the teachers union. However, Pat Sampier, Assistant Superintendent of Human Resources does not want that to happen. Instead, she would like to see the two sides reach a mutual agreement. I am not predicting anything, but one should know the risks.

with the terms of the statute, as that has been interpreted and applied by Fact-Finders over the last half century.[29] The Fact-Finder reviewed all of the customary criteria as they may apply to the respective issues and the record made, and concluded that these criteria virtually command these determinations.

On the disputed issues, it is respectfully submitted that the Recommendation represents a fair compromise between the needs of the District for fiscal responsibility and public accountability, and the Association members' requirement for job and economic security. I find maintenance of internal comparability to be a persuasive factor. This resolution also takes into account settlements in comparable communities, particularly nearby schools districts and bargaining units, and generally maintains the historical pattern and relationship these parties have freely bargained for in the past.

As such, it reflects the parties' clear historical consensus of their relative worth, tempered by the need to adjust to the new economic reality, and by the need for finding a compromise that might break this seemingly intractable deadlock.

On the facts and issues presented, reasonable persons could differ on the results. However, both sides have real needs that should be protected. The administration must be able to run the District and its employees deserve benefits comparable to other public and private sector employers, and financial and job security. This is a rough balance of the union's and employer's interests. The scales were weighted with a long term view of the best interests of the community and the bargaining unit.

Obviously, these are recommendations only. The parties can choose to ignore

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[29]*See*, http://www.michigan.gov/dleg/0,1607,7-154-10576_17485---,00.html. Text of Fact Finding Reports and Act 312 Awards, Michigan Employment Relations Commission.

them resorting to continued legal and political warfare.[30] It is tenderly urged, however, that these are reasonable solutions to the problems which confront them. Both sides need to compromise with reality. The public would be well served if this advice was heeded.

PART THREE: CERTIFICATION

This Report and Recommendations of the Fact-Finder is based upon the evidence and testimony presented to me at the fact finding hearing. This award is made and entered this 6th day of May, 2010.

STANLEY T. DOBRY, Fact-Finder

[30]Cynical critics have referred to public sector collective bargaining as 'collective begging.' In part this is because non-uniformed services lack the right to strike, and do not have3 compulsory interest arbitration. As a matter of public policy, it is well to observe that if union's become frustrated with the dynamics of collective bargaining, it is reasonably foreseeable that they will seek out other avenues to achieve their goals.