

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
COA Panel Judges Gleicher, Markey, and Leticia.

PATRICIA BATISTA, ET AL,

Plaintiffs-Appellants,

Supreme Court No. 166305

Court of Appeals No. 353832

Court of Claims No. 19-000019-MZ

v

MICHIGAN PUBLIC SCHOOL
EMPLOYEES' RETIREMENT SYSTEM,
ET AL,

Defendants-Appellees.

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF OF APPELLEE
MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.303(B)(1) and MCR 7.305.

COUNTER-STATEMENT OF QUESTION PRESENTED

In an order dated February 2, 2024, this Court asked the parties to brief the following questions:

1. Whether the phrase “normal salary schedule” in MCL 38.1303a(3)(f) refers only to a provision contained in a collective-bargaining agreement.

Appellants’ answer: Yes.

Appellees’ answer: No.

Trial court’s answer: Did not answer.

Court of Appeals’ answer: Did not answer; however, the Court of Appeals “remain[ed] of the belief that the Legislature was speaking of schedules in collective-bargaining agreements.”

2. If the phrase “normal salary schedule” in MCL 38.1303a(3)(f) does not refer only to a provision contained in a collective-bargaining agreement, from what other source may a “normal salary schedule” be derived?

Appellants’ answer: Only with respect to salary schedules that have been authorized by local governing boards.

Appellees’ answer: With respect to the salary schedule under which three or more similarly situated members are paid, in the district or elsewhere.

Trial court’s answer: Did not answer.

Court of Appeals’ answer: With respect to the salary schedule that governs the member’s position, provided also that a salary schedule exists and that it covers 3 or more members of the same job classification; if a member works in a job classification with fewer than three members, then with respect to

the salary schedule that governs a job classification that is most nearly identical to the member's classification.

STATUTE AND ADMINISTRATIVE RULE INVOLVED**MCL 38.1303a**

(1) Except as otherwise provided in this act, "compensation" means the remuneration earned by a member for service performed as a public school employee.

(2) Compensation includes salary and wages and all of the following:

(a) Remuneration earned for all services performed as a public school employee including, but not limited to, teaching, coaching, and participation in extracurricular activities.

(b) On a current basis, investments made in a tax sheltered annuity for a public school employee as remuneration for service under this act. The remuneration shall be valued at the amount of money actually paid into the annuity.

(c) All amounts deducted from the pay of a public school employee, including amounts deducted pursuant to the member investment plan.

(d) Longevity pay.

(e) Overtime pay for service performed outside of what is considered normal working hours for the affected employee.

(f) Pay for vacation, holiday, and sick leave while absent from work. As used in this subdivision, "sick leave" includes weekly worker's disability compensation payments received for personal injury in the employ of and while employed by a reporting unit.

(g) Items of deferred compensation, exclusive of employer contributions to the retirement system.

(h) Merit pay as established by a reporting unit for the purpose of rewarding achievement of specific performance objectives.

(3) Compensation does not include any of the following:

(a) Payments for unused sick or annual leave.

(b) Bonus payments.

(c) Payments for hospitalization insurance and life insurance premiums.

(d) Other fringe benefits paid by and from the funds of employers of public school employees.

(e) Remuneration paid for the specific purpose of increasing the final average compensation.

(f) Compensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. In cases where the current job classification in the reporting unit has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used.

(4) The retirement board shall require a sworn affidavit from the member that final compensation does not include remuneration paid either directly or indirectly for actual or anticipated expenses.

(5) Based upon information and documentation provided by the member, the retirement board shall determine both of the following:

(a) Whether any form of remuneration paid to a member is identified in this section.

(b) Whether any form of remuneration that is not identified in this section should be considered compensation reportable to the retirement system under this section.

(6) In any case where a petitioner seeks to have remuneration included in compensation reportable to the retirement system, the petitioner shall have the burden of proof.

1985 AACS R. 38.1127

Rule 127. (1) Compensation means the remuneration received by a member, as defined in the act, and includes items of an economic value as specifically fixed by the retirement board. Only if the kind of remuneration or item of economic value received by a member is specifically authorized by either the retirement statute or by the retirement board shall it be included in computing the member's final average compensation.

INTRODUCTION

This case returns to this Court for the second time. Although this Court has previously decided that the Retirement Act’s anti-pension-spiking provisions generally—and the normal-salary-increase limitation contained in MCL 38.1303a(3)(f) specifically (the “NSI-Limitation”)—apply to all members, the Public School Executives insist that the Court of Appeals’ decision in *Batista II* both misconstrued this Court’s remand instructions and erred in interpreting the plain language of the NSI-Limitation. (Plaintiffs-Appellants’ supplemental brief, p 1.) In support of their argument, the Public School Executives assert that the NSI-Limitation applies only to restrict the crediting of pay increases for members who are paid according to collectively bargained “normal salary schedules.” They posit that, by using the phrase “normal salary schedule,” the Legislature intended that that the NSI-Limitation should be understood as a “term of art” that is uniquely applicable to members who are paid according to collectively bargained salary schedules—rather than to members, like them, who are not paid according to one. (Br, p 6.)

As explained below, however, the Public School Executives’ interpretation not only contravenes the plain language and unmistakable purpose of the Retirement Act’s NSI-Limitation, it also rests on flawed assumptions that are simply wrong. The truth of the matter is that that however a member might be employed and paid, the Retirement System may only credit compensation using the salary schedule under which three or more similarly situated members are paid.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Retirement System has already set forth in detail the factual and procedural background of this case in its answer in opposition filed on November 11, 2023. For the sake of framing the issues relevant for the questions this Court has asked, only the following points bear emphasizing.

The Retirement Act restrictively, and purposefully, limits the definition of pensionable “compensation.”

Both the Retirement Act and the applicable regulations contain restrictions on the types and amounts of remuneration that may be used in crediting a member’s pensionable “compensation.” MCL 38.1303a and Board Rule 127, 1985 AACS R 38.1127. The unmistakable purpose of these restrictions is to ensure the actuarial soundness of the retirement fund by preventing employees from artificially inflating compensation as a means of receiving greater retirement benefits.

Salary Schedules explained.

Far from being the unique byproduct of collective bargaining that began in the mid-twentieth century (Br, pp 6–7), the concept of salary schedules originated in civil service systems whose roots took hold at the federal level with the enactment of the Civil Service Act of 1881 and proliferated nationwide from there. Whether referred to as “normal,” “regular,” “uniform,” or something else, the fixing of pay

“schedules,” or rates, has been widely adopted as a way of standardizing the different levels of base pay for various job classifications within an organization.¹

The Retirement Act has always included anti-pension-spiking provisions.

Since its 1980 inception, the Retirement Act has expressly restricted the crediting not only of payments intended to increase a member’s final average compensation (MCL 38.1303a(3)(e)), but also with respect to pay increases in general. MCL 38.1303a(3)(f). These tandem provisions—together with the other enumerated exclusions contained in the restrictive definition of “compensation”—serve to ensure the actuarial soundness of the pension fund. Members have the burden of showing that all pay increases are in accord with the normal salary schedule for their job classification. MCL 38.1303a(3)(f); (5). In cases where a particular job classification has “less than 3 members,” the member’s reportable compensation increases are to be evaluated with respect to the salary schedule that governs three or more members whose positions are the most nearly identical to the member’s own position. MCL 38.1303a(3)(f).

¹ See e.g., Jean Prostik, *History of Teacher Pay and Incentive Reforms*, February 3, 1995, p. 9 (“The single salary schedule operates as a matrix structure of dollar amounts in columns and rows. The columns, also called ‘scales’ or ‘lanes’ represent [employees’] level of educational attainment . . . The rows, frequently called “steps,” represent years of [experience]. Any individual [employee’s] salary, then, is determined by locating the cell on the schedule that corresponds to their education level and years of [experience]. Pay raises occur at predictable intervals, as the [employee] advances within the matrix by gaining experience and/or by furthering his or her education.”) Available at <https://files.eric.ed.gov/fulltext/ED380894.pdf> (last accessed March 5, 2024).

The NSI-Limitation applies to all members, including the Public School Executives.

It is against this statutory backdrop that the Retirement System has endeavored to give effect to the Legislature’s intent that pensionable compensation is to exclude not only “remuneration paid for the specific purpose of increasing the final average compensation” (MCL 38.1303a(3)(e)), but also any year-over-year increases—excepting only those that are supported by the normal salary schedule for the member’s position or a similar position. MCL 38.1303a(3)(f). Relevant to the instant controversy, this Court has already decided that the Retirement Act’s NSI-Limitation applies to all members alike. *Batista v Office of Retirement Services*, 511 Mich 973 (2023) (*Batista II*) (affirming in part, reversing in part, and vacating in part *Batista I*) (Plaintiff-Appellant Appendix,² 15a.) This means that a public school district’s part-time crossing guard is treated the same as its superintendent, and vice versa, even though the difference in their annual pay may be several hundreds of thousands of dollars.

The Retirement System’s administration of the NSI-Limitation and relevant procedural background.

At the crux of this dispute is whether—and if so how—the Retirement System is supposed to evaluate the pay increases of the plaintiffs-appellants, i.e., eight current and former public school superintendents and assistant superintendents. These individuals, referred to here collectively as the “Public

² Defendants-Appellants hereby incorporate the Plaintiff-Appellant Appendix as the parties’ “Joint Appendix.”

School Executives,” would have this Court believe that the Legislature deigned them exempt from the NSI-Limitation because they individually negotiate their pay rather than subject themselves to a normal salary schedule, under which virtually every other public school employee is paid. (Br, p 21.) The Retirement System has countered that the choice to be paid according to personal employment contracts cannot subvert the clear and unmistakable legislative purpose evinced by the plain language of the Retirement Act.

The Public School Executives initiated this action to challenge the methods then being used by the Retirement System to give effect to the anti-pension-spiking provisions encompassed by MCL 38.1303a(3)(e) and (f). Relevant here, the Public School Executives challenged the authority of the Retirement System to evaluate their pensionable increases using indices that the Retirement System developed on the basis of compensation reported by members employed in “executive” job classifications; namely, those classified by the Retirement System as “superintendents” and “assistant superintendents” and whose compensation and service are reported to the Retirement System under the “1110” and “1120” job-class codes, respectively.

This Court has already affirmed the portion of *Batista I* that held the Retirement System is not authorized to “create” normal salary schedules, and that its efforts to develop and apply the “NSI Schedules” in evaluating the pensionable increases paid to the Public School Executives was, therefore, unlawful. 511 Mich at 973. (Joint-Appendix, p 16a.) Nevertheless, to better understand the current

dilemma—deciding how to evaluate whether payments are made for the “purpose of increasing a member’s final average compensation” (MCL 38.1303a(3)(e)) or constitute increases outside of “the normal salary schedule” for the member’s position or a similar position (MCL 38.1303a(3)(f))—it helps to consider the utility (if not the validity) of the NSI Schedules.

In short, these schedules were created by the Retirement System after it performed a system-wide, year-by-year, study of the compensation paid to members of the 1110 (superintendent) and 1120 (assistant superintendent) job classifications. The Retirement System divided the populations into groupings by job classification and district size, then calculated the actual average percentage by which the pay of each group’s members increased annually. The Retirement System then *doubled* the actual average to arrive at the “allowable” increase-amounts (known as the “NSI Schedules”), which it used as the basis to evaluate—and credit—the increases paid to each superintendent or assistant superintendent in a given year.

For instance, in the mid-2000s, the Retirement System reviewed the compensation increases paid to the retiring superintendent of Huron Valley Public Schools.³ There, the retirant sought to have his pension increased from \$8,346.92 per month (the amount determined by the Retirement System’s calculation) to \$15,601.95 per month (the amount he desired, based on the “compensation”

³ See *O’Brien v Public School Employees’ Retirement Board*, 486 Mich 958, (2010) (order denying leave).

reported on his behalf). The chart below⁴ shows the superintendent's reported remuneration for the five-year period that preceded his retirement:

| | <u>Total Remuneration</u> | <u>Increase Amount</u> | <u>Percentage Increase</u> |
|------|---------------------------|------------------------|----------------------------|
| 2001 | \$158,911.00 | | |
| 2002 | \$244,726.00 | \$85,815 | 53.00% |
| 2003 | \$328,902.00 | \$84,176 | 34.38% |
| 2004 | \$356,662.00 | \$27,760 | 8.44% |
| 2005 | \$388,121.00 | \$31,459 | 8.82% |
| 2006 | \$418,965.00 | \$30,844 | 7.94% |

As another example, the Retirement System similarly evaluated the pay increases paid to the retiring superintendent of Wayne Regional Educational Services Agency, an intermediate school district.⁵ As in the case of the retiring Huron Valley Schools' superintendent, the dispute centered on whether the remuneration reported on the member's behalf was creditable in light of the Retirement Act's anti-pension-spiking provisions:

⁴ *Id.*, see J. Corrigan's concurrence in order denying leave, which discusses the total remuneration paid to petitioner-appellant, available at: https://www.courts.michigan.gov/4a3b91/siteassets/case-documents/uploads/sct/public/orders/20100604_s140484_23_140484_2010-06-04_or.pdf (last accessed on March 5, 2024).

⁵ See *Davis v Public School Employees' Retirement System*, unpublished *per curiam* opinion of the Court of Appeals, Docket No. 302896 (issued July 17, 2012) (Attachment A).

| | <u>Total Remuneration</u> | <u>Increase Amount</u> | <u>Percentage Increase</u> |
|------|---------------------------|------------------------|----------------------------|
| 2004 | \$157,555.00 | | |
| 2005 | \$198,166.00 | \$40,611 | 25% |
| 2006 | \$202,129.32 | \$3,963.32 | 2% |
| 2007 | \$212,104.97 | \$9,975.65 | 4.94% ⁶ |

In both of the above-described situations—and in countless others—the Retirement System has neither prohibited the reporting and crediting of all pay increases, nor did it condition the reporting of compensation increases on the member first having to bear the burden of proving that each and every increase was supported by a “normal salary schedule.” Again, these members—like the individual Public School Executives who initiated this challenge—were not paid according to salary schedules. So, rather than requiring the member to prove that the amounts reported were in fact creditable, the Retirement System applied the NSI Percentage Tables as the default allowance—which allowed the retirants credit for a portion of the compensation increases they received.⁷ In this vein, the NSI Percentage Tables were used as a facsimile of a “normal salary schedule” for

⁶ *Id.*, slip op, p 3.

⁷ Then and now members are invited to rebut Respondent’s determination as to the “allowable” pensionable increases. One is left to wonder whether any “normal salary schedule” in existence would support pay increases of 53%, 34%, or 25%. In any event, in neither instance was the retirant able to sustain the burden of proving entitlement to the pensionable increases they sought.

members who did not have one; they were not used to *limit* pensionable compensation increases, but rather to *allow* them.

Although the Retirement Act’s anti-pension-spiking provisions generally—and the NSI-Limitation specifically—apply to *all members*, superintendents and assistant superintendents have been a natural focus of efforts to effectuate the Legislature’s intent in that respect. For starters, superintendents and assistant superintendents occupy job classifications that historically include “less than 3 members” and, in any event, are not paid according to normal salary schedules.

In addition, the history and plain language of Public Act 268 of 1996 indicate that the NSI-Limitation was to apply to all members, including a specific provision that was added to address members who work executive capacities. Indeed, the second clause of the NSI-Limitation—addressing the pensionable pay increases of members who work in job classifications with “less than 3 members”—was added following legislative debate about the pension “***spiking problem***” posed by “***school superintendents and others in management positions.***” See: House Fiscal Agency’s Second Analysis of House Bill 5108 (emphasis added) (Joint-Appendix, p 38a.)

Given the prior opinions and orders of the Court of Appeals and this Court regarding the NSI-Limitation, it is understood that the Retirement System may no longer determine the creditability of compensation increases paid to Public School Executives’ using the NSI Schedules. Instead, the Retirement System will now evaluate pensionable pay increases using the already existing “normal salary

schedule” for the current job classification, or, in the case of job classifications with “less than 3 members,” using the “normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units.” The Retirement System maintains that the NSI-Limitation expressly authorizes it to do exactly that.

STANDARD OF REVIEW

Questions of statutory construction are reviewed de novo. *Hegadorn v Department of Human Services Director*, 503 Mich 231 (2019) (internal citations omitted). The purpose of the court, and its primary goal, in interpreting a statute is to give effect to the legislative intent. *Id.* The best and primary indicator and the most reliable evidence of intent is the plain language of the statute. *Id.* Courts must enforce such language as written, giving effect to every word, phrase, and clause. *Perkovic v Zurich Am Ins Co*, 500 Mich 44, 49 (2017) (internal citations omitted). In the absence of any means available for fact finding regarding the legislative intent, the court must ascribe to the legislature what it deems to be the most likely and rational intention. *Rowell v Security Steel Processing Co*, 445 Mich 347 (1994).

A statutory term is given its plain and ordinary meaning unless it is a term of art. See, e.g., *Sanford v State*, 506 Mich 10, 21, n 19 (2020). When a term is legal term of art, it “must be construed in accordance with its peculiar and appropriate legal meaning.” *Wilcox v Wheatley*, 342 Mich App 551, 558 (2022). Where Black’s

Law Dictionary does not define a term, that term would not appear to be a term of art. See *id.*

ARGUMENT

I. The Retirement Act’s NSI-Limitation applies to all members, and it does not apply only to members who are employed by collectively bargained agreements, nor does it employ terms of art.

Consistent this Court’s remand order, the NSI-Limitation that ensures school district do not engage in the improper spiking of compensation applies to all members, and thus also applies to superintendents and assistant superintendents. The arguments of the Public School Executives about the nature of the phrase “normal schedule increase” and the history of these civil services rules are mistaken. And contrary to the claims of the Public School Executives, the Retirement System’s inclusion of some part of these compensation increases only *guarantees* that the increases may be creditable rather than operating as some unsupported limit on them.

A. The plain language of the NSI-Limitation evinces the Legislature’s clear intent to credit only pay increases that are supported by a normal salary schedule.

The Retirement System has already explained, and this Court has already decided, that the NSI-Limitation applies to all members and excludes from the definition of pensionable “compensation” any year-over-year pay increases that are

not provided in the normal salary schedule for the member's position or a similar position. Respondent submits that the Retirement Act's NSI-Limitation evinces the Legislature's intent that pay increases may not be credited unless and until they constitute a "normal" increase, which is to be determined relative to the salary schedule under which three or more similarly situated members are paid.

In this vein, the NSI-Limitation is indeed a salary *increase* limitation. This understanding is consistent not only with the plain language of the Retirement Act, but it is also supported by the context and legislative history of statute.

In specific, the Retirement Act has always restricted the crediting of pensionable "compensation" increases. To that end, the Retirement Act excludes any increase that is not supported by "the normal salary schedule" for the member's position and, in cases where "less than 3 members" are employed in a given job classification, using the normal salary schedule for the most nearly identical position to the member's own. Given that the primary purpose of interpreting a statute is to give effect to the Legislature's intent, and that the most reliable evidence of intent is the plain language of a statute, the NSI-Limitation must be understood in the context of the Retirement Act's restrictive definition of "compensation"; one that unambiguously aligns with the Legislature's apparent concern about the problem of pension spiking, and particularly as it pertains to Public School Executives who are uniquely positioned to engage in such manipulations for their own gain. This construction is the only one that gives effect to the plain language of the Retirement Act, is consistent with the legislative

history of the provision, and effectuates what is unquestionably the Legislature's intent.

B. Contrary to the argument of the Public School Executives, the phrase “normal salary schedule” is not a term of art.

Considering the force with which the Public School Executives argue that a “normal salary schedule” must be understood only as a term of art that uniquely concerns public school employees who collectively bargain, it is remarkable that they do not invoke a single court case, statute or treatise to substantiate that contention. (“Ultimately, the concepts of ‘normal salary schedules’ and ‘job classifications’ were created by, and exist specifically because of, collective bargaining.” (Br, p 7.) The conclusory argument of the Public School Executives notwithstanding, there is no historical, statutory, or logical basis to conclude that the Retirement Act's NSI-Limitation only governs members who collectively bargain or that salary schedules are unique to collective bargaining agreements.⁸

As noted above in the Retirement System's counter-statement of facts, salary schedules were neither born from nor are they exclusive to the practice of collective bargaining.⁹ Salary schedules have been described as “artifacts of the civil service

⁸ See, e.g., Todd A. DeMitchell & Martha Parker-Magana, *A “Law Too Far?” The Wisconsin Budget Repair Act: Point*, 275 Ed. Law Rep. 1 (2012) (noting “that the states that do not have public sector collective bargaining laws have essentially the same type of salary schedules as the states that have public sector collective bargaining.”)

⁹ See, e.g., *Engquist v Livingston Co*, 139 Mich App 280, 281–282 (1984) (discussing an issue involving a salary schedule that was adopted by the county board that applied to non-unionized employees); see also *Muskegon Co Wastewater Mgt Sys*,

system” and their use in public schools has proliferated since the early-twentieth century.¹⁰ Throughout the early 20th century, as the field of education expanded and professionalized, the use of salary schedules became more widespread across various school districts and states.¹¹ Accordingly, it can hardly be maintained that the term “normal salary schedule” is exclusive to the domain of public employees who collectively bargain. After all, salary schedules have been commonplace for

1995 MERC Lab Op 377 (indicating that the charging party was an employee subject to a “*non-union salary schedule.*”) (Emphasis added.)

¹⁰ See, e.g., Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?* 30 Harv JL & Public Policy, 885, 909 (2007) (“Since 1921, when the single salary schedule was introduced in Denver and Des Moines, the rank and column, civil service-type salary schedule has become virtually universal in public schools). Available at: <https://deliverypdf.ssrn.com/delivery.php?ID=702000084013070008067106018071024065061037007020071061119067029014064115077103117101058020007125050109119007026114000114118010030071029038092099125000127001070024038042022096103020025081083025082009088003006004091089066115105124082016091005070066111&EXT=pdf&INDEX=TRUE> (last accessed on March 5, 2024).

¹¹ See, e.g., *Annual Reports of the Town Officers of the Town of Upton [Massachusetts], for the Year Ending February 1, 1899*, which includes a “salary schedule” for teachers at pp 79–80, available at <https://books.google.com/books?id=e9RHAQAAMAAJ&lpg=RA8-PA79&dq=What%20is%20a%20%22normal%20salary%20schedule%22%3F&pg=RA8-PA79#v=onepage&q&f=false> (last accessed on March 5, 2024); see also: *Journal of Proceedings of the Board of Education of the City of Detroit for the Year 1906*, which provides a “schedule of annual salaries of principals and teachers” at p 129, available at <https://books.google.com/books?id=MBxRAQAAMAAJ&lpg=RA1-PA130&dq=What%20is%20a%20%22normal%20salary%20schedule%22%3F&pg=RA1-PA130#v=onepage&q=What%20is%20a%20%22normal%20salary%20schedule%22%3F&f=false> (last accessed on March 5, 2024); see also: Evenden, Edward Samuel, *Teachers’ salaries and salary schedules in the United States, 1918-19*, National Education Association (1919), available at https://books.google.com/books?id=d1C_lsc_5FgC&pg=PP3#v=onepage&q&f=false (last accessed on March 5, 2024).

more than a century—long before public school employees began collectively bargaining.

Furthermore, there is no indication that the Legislature intended the terms “normal salary schedule” and “job classification” to have a special meaning. These terms are not defined either in the Retirement Act or in Black’s Law Dictionary. As such, they should be understood according to their plain and ordinary meaning, taking into account the context in which the words are used. See *Western Michigan University Bd of Control v Michigan*, 455 Mich 531, 539 (1997). When a term or phrase is not defined in a statute, courts may consult dictionary definitions to determine the plain and ordinary meaning of a word. *Ford Motor Co v Dep’t of Treasury*, 313 Mich App 572 (2015).

Webster’s New World Dictionary of the American Language (2nd ed., 1976) defines the term “normal” as “conforming with or constituting an accepted standard, model, or pattern[.]” It defines “salary” as “a fixed payment at regular intervals for services[.]” It defines “schedule” as “a list, catalog, or inventory of details[.]” Taken together, these definitions indicate that a “normal salary schedule” should be understood to mean a written list that fixes the compensation to be paid for prescribed services.

Furthermore, little needs to be said with respect to the Public School Executives’ equally empty claim that the term “job classification” is similarly exclusive to the context of collective bargaining. (Br, p 5.) As with “normal salary schedules,” the term “job classification” is not defined by Black’s Law Dictionary

and its use has been ensconced in the vernacular of civil service regulations that date back to the 1800s—long before collective bargaining took hold. Even in the context of collective bargaining, a public employer collectively bargains with a “bargaining unit,” not a job classification. As the Public School Executives recognize, a “bargaining unit” is an employment group that shares a community of interests. (Br, p 5.) This community of interests may—or may not—include job classifications. In any case, the Retirement Act does not use the phrase “bargaining unit” in the definition of “compensation.” Therefore, the term “job classification” in this context does not have a special meaning that is exclusive to the context of collective bargaining.

Put simply, there is no merit to the Public School Executives’ insistence that the Retirement Act’s NSI-Limitation should be accorded an “artful” interpretation, let alone for its application to be restricted only to those who are paid according to a collectively bargained salary schedule. Rather, in context, the first sentence of the NSI-Limitation reflects the general prohibition on the crediting of pay increases—allowing only those that are supported by the normal salary schedule for the member’s job classification. The second sentence reflects that the intention to ensure that the NSI-Limitation is applied using salary schedules to which *3 or more* members are subject. As discussed in further detail in the next argument, the second sentence of the NSI-Limitation appears to be aimed at “superintendents and others in management positions” that, by dint of custom or otherwise, do not have “normal salary schedules” of their own—in which case the Retirement System is to

identify and apply the “the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units.” MCL 38.1303a(3)(f).

C. The Public School Executives’ understanding of the legislative history of the Retirement Act’s NSI-Limitation is both incomplete and incorrect.

Just as the Public School Executives are mistaken regarding the origins of “salary schedules” and “job classifications,” their understanding regarding the historical underpinnings of the NSI-Limitation is similarly lacking. The Public School Executives posit that Section 3a(3)(f) was added “to remedy one specific issue”—namely, the practice of granting retirement credit to members who leave public school employment to work for the unions. (Br, pp 11–16). But a review of the legislative history reveals unbridgeable gaps in their understanding. In fact, Section 3a(3)(f) expressly governs the crediting of pay increases for all members.

The Retirement Act’s NSI-Limitation has nothing to do with professional services leave. As discussed already in the Retirement System’s counter-statement of facts, the Retirement Act has *always* had an NSI-Limitation; it did not originate “in 1996,” as the Public School Executives suggest. (Br, pp 10–11.) The only material change that occurred in 1996 was the enactment of Public Act 268, which added two important—and distinct—provisions to the Retirement Act. As explained ahead, Public Act 268 of 1996 accomplished two things: First, it expressly addressed the crediting of professional services leave. Second, it separately addressed—in a different section of the Retirement Act—the restriction on the

crediting of year-over-year pay increases for members who work in job classifications of “less than 3 members.” The Public School Executives improperly conflate these two separate provisions as being one and the same, but they are not.

The Public School Executives correctly identify Public Act 268 of 1996 as originating from House Bill 5108, which was introduced the prior year. (Br, p 11.) That bill, in its original form, was aimed at restricting the crediting of service and compensation rendered by former public school employees who were hired by their union. The bill endeavored to do that in two ways: First, it proposed amending the definition of “compensation” to expressly exclude from crediting “remuneration earned by the member for services performed for the public school employee organization.” Second, it proposed amending the provision pertaining to the crediting of certain professional services leave to specify the manner and extent to which such service—and the compensation associated with that service—could be credited; namely, by providing: (1) for compensation to be credited “at the rate of compensation paid to the member” prior to taking professional services leave; and (2) for contributions to be paid relative to the member’s former rate of compensation. See House Bill 5108, introduced September 21, 1995 (Joint-Appendix, p 28a).

It is evident that the changes contemplated by the original bill had nothing to do with the already-existing NSI-Limitation. Again, the bill as introduced would have specified the exact way service and compensation tied to professional services leave could be credited; its effectuation did not depend on or relate to the already-

existing NSI-Limitation, nor did it concern “normal salary schedules.” This plain reading of the statutory language is confirmed by the House Fiscal Agency Committee Summary Analysis of House Bill 5108 as introduced as it reflects exactly that fact:

The Public School Employees Retirement Act currently specifies that a member’s time spent working during an “employee organization professional services leave” or “released time” (i.e., time spent working for a union that represents public school employees) must be used to calculate service in the system and compensation for purposes of determining his or her pension. The state retirement board generally is required to grant service credit for this work as long as the member and his or her employing unit meet certain conditions. The bill would amend the act to specify that for any such work commencing on or after January 1, 1996, compensation would not include earnings from that work but, rather, would be calculated using the person’s pay rate from the reporting unit immediately prior to the leave or released time. [(Joint-Appendix, p 37a.)]

After referral to committee, the House Fiscal Agency’s first analysis reflects that consideration was given to the concern that the bill as introduced would have curbed pension-spiking with respect only to the relatively small number of members who participate in professional services leave, while not addressing “*the spiking problem that exists among school superintendents and others in management positions*[.]” House Fiscal Agency Analysis, First Analysis, completed on 2/20/1996 (emphasis added).¹² Not incidentally, a substitute bill was subsequently introduced that reflects attention to that very issue, culminating in a distinct proposal to redefine “compensation,” while separately addressing the professional services leave

¹² Available at <https://www.legislature.mi.gov/documents/1995-1996/billanalysis/House/pdf/1995-HLA-5108-A.pdf> (last accessed on March 5, 2024).

problem. See House Substitute H-3, introduced on 3/26/1996.¹³ The House Fiscal Agency's analysis of the substitute bill reflects that the proposal to redefine "compensation" was distinct from the original proposal to restrict the how professional services leave was to be credited:

The bill would add a new section that would redefine "compensation." For the most part, the definition is the same as current law; however, the new definition would be more specific. Salary and wages would include remuneration earned for all services performed as a public school employee. Compensation for sick leave would include weekly worker's disability compensation payments received for personal injury in the employ of and while employed by a reporting unit (school district). Compensation also would include merit pay as established by a reporting unit for the purpose of rewarding achievement of specific performance objectives.

Currently, certain payments are not included as compensation. The bill also provides that in cases in which the current job classification in the reporting unit had fewer than three members, the normal salary schedule for that job classification would be the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units. The normal salary schedule used for this classification of employees would determine whether the increases from the previous year would be allowable increases for determining final average compensation. Also, the bill would require the retirement board to determine whether any form of remuneration paid to a member was identified in this statute, and whether any unidentified form of remuneration should be considered compensation reportable to the retirement system under the act. [(House Fiscal Agency Analysis, Second Analysis, completed on 8/20/1996, p 2) (Joint-Appendix, p 38a)].

Significantly, the substitute bill, H-3, included a distinct provision—specific only to members on professional services leave—to provide for the crediting of such pay to include "the normal and customary increases that would have been paid to the member by the reporting unit had the member remained in the same position

¹³ See Attachment B.

held at the reporting unit immediately preceding the date the member commenced the leave or released time.” See Section 71 of H-3 substitute to House Bill 5108; see also MCL 38.1371, as amended by Public Act 268 of 1996. Both the House and Senate Fiscal Agency analyses of the substitutes for House Bill 5108 include discussion of *that* change in a separate section from that which would redefine “compensation.”¹⁴

Ultimately, the substitute bill passed and the Retirement Act was amended to *both*: (1) redefine “compensation” to include a mechanism to credit the pay increases of members who work in job classifications with “less than 3 members”; *and* to (2) provide for professional services leave to be credited relative to the compensation paid to the member prior to taking professional services leave, inclusive of “normal and customary” increases they otherwise would have received

¹⁴ See House Fiscal Agency Analysis, Second Analysis, completed on 8/20/1996 (Joint-Appendix, p 38a); see also Senate Fiscal Analysis, Committee Summary, completed on 5/7/1996 (“The bill would amend the Public School Employees Retirement Act to limit the amount of compensation that could be reported and included in the earnings record of a Michigan Public School Employees Retirement System (MPERS) member who began a leave of absence for employee organization professional services or for professional services released time on or after October 1, 1996. The bill also would create a new definition of “compensation” that describes what could and could not be included in the compensation used to determine retirement benefits for an MPERS member”) available at <https://www.legislature.mi.gov/documents/1995-1996/billanalysis/Senate/pdf/1995-SFA-5108-S.pdf> (last accessed on March 5, 2024); see also: Senate Fiscal Analysis, Floor Analysis, completed on 5/15/1996, which also reflects distinct discussion of the separate professional-services-leave and NSI-Limitation provisions, respectively, available at <https://www.legislature.mi.gov/documents/1995-1996/billanalysis/Senate/pdf/1995-SFA-5108-F.pdf> (last accessed on March 5, 2024).

had they remained so employed. See MCL 38.1303a(3)(f) and MCL 38.1371, as amended by Public Act 268 of 1996.

The Public School Executives are, thus, wrong that “PA 268 sought to remedy one specific issue.” (Br, p 12.) In fact, there are two *separate* provisions. And neither is dependent on, nor do they “bolster,” the other, as the Public School Executives incorrectly suggest. (*Id.* at 14–15.)

II. The NSI-Limitation, as applied to the Public School Executives, requires the use of the salary schedule that governs the pay of similarly situated members.

Having established that the Retirement Act’s NSI-Limitation applies to all members; that the term “normal salary schedule” (on which pensionable increases are to be evaluated) does not refer only to a provision of a collectively bargained agreement; and that Public School Executives are not paid according to salary schedules, only one question remains: *Are Public School Executives able to receive credit for any pay increases, and if so how?* The answer to this question is straightforward: *the Retirement Act provides for the Retirement System to credit pay increases with respect to the salary schedule under which 3 or more similarly situated members are paid.*

A. The Retirement System credits increases according to a normal salary schedule of which 3 or more similarly situated members are paid.

In particular, the first clause of the NSI-Limitation reflects that pensionable “compensation” cannot include credit for *any* increases unless the increase is

provided by the salary schedule for the member's job classification. The second clause makes clear that whether or not a member has his or her own salary schedule, determinations regarding pensionable compensation increases are to be made with respect to the salary schedule that applies to a job classification that is most similar to the member's own and to which three or more members are subject.

B. The Public School Executives do not address this issue, failing to explain why the increase of superintendents and assistant superintendents may not be measured by analogous salary schedules.

In contrast, the Public School Executives do not attempt to answer this question; rather, they argue that "only the governing board" can establish salary schedules. (Br, pp 19–20.) While that may well be true, it is not clear what relevance the argument has to the matter at hand. Having said that, it does bear noticing, however, that "the governing board" of each reporting unit has the unquestionable authority to adopt and thereafter pay their Public School Executives on the basis of duly-authorized salary schedules. That they have chosen not to do so simply reflects a choice—presumably a measured one made by sophisticated contracting parties who have weighed the potential advantages and disadvantages of doing so in accordance with applicable laws. Whatever the case may be, the manner in which Public School Executives are paid—by choice, dint of custom, or otherwise—has no bearing on whether, and if so how, pensionable compensation increases are to be credited.

The fact of the matter is that no law or circumstance unique to superintendents and assistant superintendents prevents them from being paid according to salary schedules, or for their pay increases to be indexed to those payable to their rank-and-file counterparts. A public school district could, for instance, establish one or more salary schedules for its superintendent, assistant superintendent(s), athletic director(s), business office executive(s) and the like—specifying the base salaries, rate-increases, and any appropriate supplements specific to the member’s position. Such a schedule (or schedules) would not be materially different than a salary schedule for teachers that includes “lanes” and “steps” relative to experience, with supplements paid relative to certain attainments (e.g., for possessing a master’s degree or doctorate degree or for performing specified functions). The point, here, is that nothing stopping Public School Executives from being paid according to a salary schedule.

Rather than muse about the conceivable ways by which the Public School Executives might solve this “problem” of their own making, this Court need only consider the situation at hand. To that end, for whatever reason, Public School Executives are not paid under salary schedules. Consequently, the Retirement System may only credit pay increases to the extent that the increases are supported by a salary schedule under which three or more similar members are paid. This is exactly what the NSI-Limitation requires—no more and no less.

To effectuate the plain language of the Retirement Act, the Retirement System is empowered to condition the reporting of compensation increases as to any

member—and specifically as to Public School Executives—by first identifying the existence of a salary schedule applicable to the member’s position or to a position similar to the member’s position and thereafter determining the pensionable increases thereunder allowed. Given this Court’s pronouncements on the subject—and the Court of Appeals’ opinion in *Batista II* that followed those instructions—the Retirement System is not only authorized to evaluate pay increases of Public School Executives with respect to “the normal salary schedule” for the position most similar to theirs, it is required to do so.

Based on the foregoing, the Retirement Act’s NSI-Limitation should neither be construed nor applied as a limitation that only governs those who are paid according to “normal salary schedules”—whether bargained for collectively or otherwise. The Retirement Act clearly restricts the crediting of pay increases only to those amounts that are supported by the salary schedule under which 3 or more similarly situated members are paid. Accordingly, the Retirement Act authorizes the Retirement System to evaluate and credit a superintendent’s or assistant superintendent’s pensionable compensation increases with respect to the normal salary schedule under which 3 or more members that are most similar to them are paid.

CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, the Retirement Act's NSI-Limitation should neither be construed nor applied as a limitation that only governs those who are paid according to "normal salary schedules—whether bargained for collectively or otherwise. The Retirement Act, itself, expressly restricts the crediting of pensionable compensation. Accordingly, the Retirement Act not only authorizes, but it also requires, the Retirement System to evaluate and credit a superintendent's or assistant superintendent's pensionable compensation increases with respect to the normal salary schedule under which 3 or more members that are most similar to them are paid.

Respectfully submitted,

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