STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA BATISTA, DAVID BRITTEN, TIMOTHY DONAHUE, AARON GAFFNEY, JOHN HEWITT, RONALD KOEHLER, AMY SWANTEK, CHRIS THOMSON, and MICHIGAN ASSOCIATION OF SUPERINTENDENTS AND ADMINISTRATORS,

Plaintiffs-Appellants,

v

OFFICE OF RETIREMENT SERVICES, MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, MICHIGAN PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD, PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM BOARD MEMBERS, and EXECUTIVE DIRECTOR OF RETIREMENT SERVICES,

Defendants-Appellees.

FOR PUBLICATION
September 14, 2023
9:00 a.m.

No. 353832
Court of Claims
LC No. 19-000019-MZ

ON REMAND

Before: GLEICHER, C.J., and MARKEY and LETICA, JJ.

MARKEY, J.

This case is before us[1] for the second time after our Supreme Court issued an order affirming in part, vacating in part, and reversing in part our original judgment and remanding the case for further consideration. *Batista v Office of Retirement Servs*, 990 NW2d 363 (2023). We previously held that the Office of Retirement Services (ORS) "had no statutory authority under MCL 38.1303a to create . . . [normal salary increase or] NSI schedules" and that the schedules

[1] We note that Judge LETICA did not sit on the panel at the time the first opinion was issued. She was subsequently named as a substitute after the passing of Judge FORT HOOD.

were unlawful and invalid. *Batista v Office of Retirement Servs*, 338 Mich App 340, 361; 980 NW2d 107 (2021). The Supreme Court affirmed this holding, agreeing that the ORS lacked the authority to create and implement its own NSI schedules. *Batista*, 990 NW2d 363. Although there are other issues that we must address and resolve, because our Supreme Court upheld our central holding and because that holding requires reversal of the decision by the Court of Claims and entry of judgment in favor of plaintiffs, we once again reverse and remand.

In our earlier opinion, we set forth the statutory framework, an overview of background information, procedural aspects of the litigation, the parties' arguments, the standard of review, and the relevant principles governing summary disposition and statutory construction. *Batista*, 338 Mich App at 342-358. The Supreme Court did nothing to affect these components of our opinion; therefore, they stand and we incorporate them by reference. We next engaged in an analysis of the issues, discussing and holding, in full, as follows:

> We hold that the Retirement Act[2] does not authorize the ORS to create and implement NSI schedules and apply them to superintendents and administrators under the plain and unambiguous language of the statutory scheme. In light of our ruling, it is unnecessary to address the additional arguments plaintiffs pose in this appeal.
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> As indicated earlier, reportable compensation does not include "[c]ompensation 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. . . ." MCL 38.1303a(3)(f). This is the first of two sentences in Subdivision (f) of the statute, each of which we will separately analyze. Again, the Legislature did not define the term "normal salary schedule." We find it abundantly clear from the Legislature's references to "the" normal salary schedule and "the" current job classification that the Legislature was necessarily alluding to schedules and classifications that were familiar to school personnel and already in place in the particular contextual setting of collective bargaining. The references to "normal salary schedule" for a "job classification" plainly pertain to salary schedules contained in collective-bargaining agreements. . . . The language in the initial sentence of MCL 38.1303a(3)(f) simply does not invite or authorize the creation of salary schedules and classifications by the ORS. Superintendents and administrators, such as plaintiffs, are not compensated pursuant to normal salary schedules; rather, they perform their duties and functions pursuant to personal employment contracts that, by definition, are distinct and tailored to particular individuals.
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> To justify the creation of the NSI schedules by the ORS, defendants rely on the second sentence of MCL 38.1303a(3)(f), which provides, "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

[2] This is a reference to the Public School Employees Retirement Act, MCL 38.1301 *et seq.*

or in similar reporting units shall be used." Indeed, the heart of this case involves the construction of this provision. The second sentence of MCL 38.1303a(3)(f) clearly concerns the same setting as, and is a continuation of, the preceding sentence, except that it addresses a situation in which the job classification has fewer than three members; no other deviation is involved or contemplated. The plain language of the sentences does not reflect a jump from a focus on compensation of employees subject to salary schedules and collective-bargaining agreements to a focus on employees who work under personal employment contracts. Moreover, the second sentence of MCL 38.1303a(3)(f) in no form or manner authorizes the creation of a normal salary schedule or an NSI schedule as described in the ORS's manual. Instead, it merely directs the use of an existing normal salary schedule for another job classification in the reporting unit or a similar reporting unit. Because the plain and unambiguous language does not authorize the creation of the NSI schedules, we need not entertain plaintiffs' arguments regarding legislative history or their uncontested assertion that some reporting units have three or more assistant superintendents, yet the NSI schedules are applied to them.

MCL 38.1303a(5)(a) and (b) provide that the retirement board, based on information and documentation provided by a member, shall determine "[w]hether any form of remuneration paid to a member is identified in this section" and "[w]hether any form of remuneration that is not identified in this section should be considered compensation reportable to the retirement system under this section." The plain and unambiguous language of MCL 38.1303a(5) does not provide broad authority to the ORS or any of the defendants to create NSI schedules for superintendents and administrators. MCL 38.1303a(5) authorizes the retirement board to make individual compensation determinations. . . . Moreover, MCL 38.1303a(5) confines the retirement board's decision-making authority to ascertaining whether a "form" of remuneration received by a member constitutes reportable compensation. There does not appear to be any dispute that the form of remuneration received by the individual plaintiffs was generally reportable compensation under MCL 38.1303a(1) and (2).

Finally, to be clear, we are not ruling that superintendents and administrators, such as plaintiffs, are not otherwise subject to the provisions of MCL 38.1303a; as members, MCL 38.1303a generally applies to them. We are only holding that MCL 38.1303a(3)(f) does not govern members who work pursuant to personal employment contracts because, in such cases, normal salary schedules and collective-bargaining agreements are not involved. MCL 38.1303a(3)(f) does not authorize the ORS to create NSI schedules for superintendents and administrators.

In sum, the ORS had no statutory authority under MCL 38.1303a to create the NSI schedules. Moreover, even assuming that the NSI schedules were merely interpretive statements or guidelines, as urged by defendants, and not rules, we find they were still challengeable and are invalid. . . . .

> In light of our holding that the NSI schedules were not lawfully created and are invalid, we need not address plaintiffs' argument that the NSI schedules violated the . . . procedural requirements with respect to rulemaking. Plaintiffs also argue that the trial court erred by summarily dismissing the constitutional claims in Counts II and IV because the claims not only concerned the individual plaintiffs, they also constituted broad facial challenges seeking declaratory relief that would affect a whole class of individuals who were not employed under collective-bargaining agreements. Given that we have invalidated the NSI schedules because their creation exceeded the authority of the ORS, we need not assess whether they were also unconstitutional. . . . .
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> We reverse and remand for entry of judgment in favor of plaintiffs with respect to declaratory relief and the invalidity of the NSI schedules under the Retirement Act. [*Batista*, 338 Mich App at 357-362 (citations omitted).]

Defendants filed an application for leave to appeal, and the Michigan Supreme Court entered an order scheduling oral argument on the application. *Batista v Office of Retirement Servs*, 969 NW2d 1 (2022). On April 5, 2023, the Court entertained oral argument. Subsequently, our Supreme Court issued the order remanding the case to this panel. *Batista*, 990 NW2d 363. We shall dissect the order and address each portion.

The Supreme Court began by affirming our ruling that the ORS lacked statutory authority to create and implement the NSI schedules. *Id.* But the Court then stated:

> However, we do not address whether the phrase "normal salary schedule" in MCL 38.1303a(3)(f) refers only to a provision contained in a collective-bargaining agreement. To the extent the Court of Appeals' holding that ORS lacks the authority to create and implement its own normal salary increase schedules was based on such a conclusion, we VACATE that part of its opinion. The Court of Appeals should consider this issue on remand if necessary to resolve this appeal. [*Id.*]

For the reasons stated later in this opinion, we conclude that it is unnecessary for purposes of resolving this appeal to consider the issue regarding "whether the phrase 'normal salary schedule' in MCL 38.1303a(3)(f) refers only to a provision contained in a collective-bargaining agreement." *Id.* Part of our reasoning for ruling that the ORS lacked authority to create and implement its own NSI schedules was that the phrase "normal salary schedule" in MCL 38.1303a(3)(f) pertains solely to collective-bargaining agreements. *Batista*, 338 Mich App at 358-359. To that extent, the Supreme Court vacated our opinion. We do note, however, that we ultimately reached our conclusion "[b]ecause the plain and unambiguous language [of MCL 38.1303a(3)(f)] does not authorize the creation of the NSI schedules[.]" *Batista*, 338 Mich App at 359. Accordingly, even had we determined that a "normal salary schedule" could exist outside the context of a collective-bargaining agreement, or had we not even broached the issue, we still would have concluded that MCL 38.1303a(3)(f) did not authorize the ORS to create and implement NSI schedules.

The Supreme Court further ordered:

> We REVERSE the Court of Appeals' holding that MCL 38.1303a(3)(f) does not govern public school employees who work pursuant to personal employment contracts rather than collective bargaining agreements. The Retirement Act provides that a "member" in certain circumstances is entitled to a retirement allowance, MCL 38.1381, and defines "member" to include most public school employees, MCL 38.1305(1). The Retirement Act does not exclude public school employees who work pursuant to personal employment contracts from being members. *Id*. Moreover, MCL 38.1303a(1) explains that "[e]xcept as otherwise provided in this act, 'compensation' means the remuneration earned by a member for service performed as a public school employee." (Emphasis added.) Subsections (2) and (3) then provide a list of items that do and do not constitute "compensation" for the purpose of determining a member's retirement allowance. As recognized by the Court of Appeals, there is no indication that MCL 38.1303a does not generally apply to all members. However, the Court of Appeals erred by holding that MCL 38.1303a(3)(f) uniquely applies only to the subset of members who work pursuant to collective bargaining agreements. Nothing in MCL 38.1303a(3)(f) makes such a distinction.
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> We REMAND this case to the Court of Appeals to address how MCL 38.1303a(3)(f) applies to public school employees who do not work pursuant to collective bargaining agreements and to further address how this holding affects plaintiffs' claims in this case. In its discretion, the Court of Appeals may also address plaintiffs' other preserved claims and any other issue that is necessary to resolve this appeal. [*Batista*, 990 NW2d 363 (alteration in original).]

Again, for purposes of calculating a member's "final average compensation" and retirement allowance, MCL 38.1303a(3)(f) provides that compensation does not include:

> 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.

In light of the Supreme Court's order, MCL 38.1303a(3)(f) applies to plaintiff members, even though they work under personal employment contracts and not collective-bargaining agreements. We first examine the initial sentence of MCL 38.1303a(3)(f), which is triggered when, within a particular reporting unit, a member works in a job classification that has three or more members. Any increase in annual compensation is not includable in calculating a retirement allowance *except* when the increase is reflected in "the normal salary schedule for the current job classification." Assuming without deciding that the Legislature's use of the phrase "the normal salary schedule for the current job classification" was intended to encompass schedules that existed outside of collective-bargaining agreements, plaintiff members work under personal employment contracts and are not subject to anything that could reasonably be construed or described as normal

salary schedules for current job classifications.[3] Therefore, the exception in the first sentence of MCL 38.1303a(3)(f) for "increases provided by the normal salary schedule for the current job classification" does not apply, effectively meaning that annual increases in compensation cannot be included in the calculation of a member's retirement allowance. While we contemplated an analysis of MCL 38.1303a(3)(f) that would allow consideration of annual compensation increases set forth in personal employment contracts in calculating retirement allowances and exclude any compensation that exceeds contractual increases in compensation, assuming that this is even possible, we would effectively be butchering the statutory language if we did so.

Our analysis changes, however, in construing the second sentence of MCL 38.1303a(3)(f), which is triggered when, within a particular reporting unit, a member works in a job classification that has fewer than three members. In that situation, a "normal salary schedule" must be utilized, and it is entirely irrelevant whether the member works under a personal employment contract or does not otherwise work pursuant to a "normal salary schedule." The Legislature appears to have assumed that a member falling within the parameters of the second sentence of MCL 38.1303a(3)(f) would not be covered by his or her own "normal salary schedule." The retirement allowance for these members is calculated using "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). Therefore, if plaintiff members fall within the ambit of the second sentence of MCL 38.1303a(3)(f), they must be shoehorned into an existing normal salary schedule. And when they receive annual increases in compensation, there is at least a possibility of including some if not all of the increases in calculating a final average compensation, unlike those plaintiff members who fit within the first sentence of MCL 38.1303a(3)(f).

We recognize the unfairness produced by our construction of the two distinct provisions in MCL 38.1303a(3)(f), but given the language of MCL 38.1303a(3)(f) and our Supreme Court's order, we have no choice in reaching our conclusion because we may not legislate from the bench: We implore the Legislature to address the patent flaws in the statutory language.

The current litigation solely concerns the validity of ORS's creation of NSI schedules, and as we ruled earlier, the ORS lacked statutory authority under the Retirement Act to create and implement the NSI schedules, which ruling the Supreme Court affirmed. Accordingly, there is no need to address plaintiffs' additional arguments.

[3] We are of course excluding consideration of the unlawful schedules created by the ORS. Although we do not determine whether the phrase "normal salary schedule" in MCL 38.1303a(3)(f) refers only to a provision contained in a collective-bargaining agreement because it is unnecessary for us to do so, we remain of the belief that the Legislature was speaking of schedules in collective-bargaining agreements.

We reverse and remand for entry of judgment in favor of plaintiffs with respect to declaratory relief and the invalidity of the NSI schedules under the Retirement Act. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Elizabeth L. Gleicher
/s/ Anica Letica