

**BARGAINING / MEDIATION / ACT 312 / FACT-FINDING  
PROCESSES IN A FISCAL EMERGENCY**

Presented by:  
Craig S. Schwartz  
Butzel Long, a professional corporation  
41000 Woodward Avenue  
Stoneridge West  
Bloomfield Hills, Michigan 48304  
248-258-2507  
[Schwartz@butzel.com](mailto:Schwartz@butzel.com)

**A. The Suspension of the Duty to Bargain Under Public Act 436, the Local Financial Stability and Choice Act**

**1. Public Employers Subject to a Consent Agreement**

- Section 8(11) of P.A. 436 provides:

(11) Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this Act, that local government is not subject to Section 15(1) of 1947 P.A. 336, MCL 423.215 [PERA] for the remaining term of the consent agreement.
- Section 15(9) of PERA provides:

(9) A unit of local government that enters into a consent agreement under [the former Public Act 4] is not subject to Section (1) for the term of the consent agreement [as provided in P.A. 4].
- Enacting Section 2 of P.A. 436 states, however, that “It is the intent of the legislature that this act function and be interpreted as a successor statute to... former 2011 P.A., and that whenever possible a reference to... former 2011 P.A. 4... shall function and be interpreted to reference to this act with the other laws of this state referencing... former 2011 P.A. 4, including, but not limited to, all of the following  
\* \* \*

(i) 1947 P.A. 336, MCL 423.201 [PERA] to 423.217.

**2. Public Employers in Receivership Under an Emergency Manager**

- Section 27(3) of P.A. 436 provides:

(3) A local government placed in receivership under this act is not subject to Section 15(1) of 1947 P.A. 336, MCL 423.215 [PERA] for a period of 5 years from the date the local government is placed in receivership or until the receivership is terminated, whichever occurs first.

**B. The Ability of Emergency Managers to Reject, Modify or Terminate Collective Bargaining Agreements**

- Section 12(k) of P.A. 436 provides:

(k) Subject to Section 19, after meeting and conferring with the appropriate bargaining representative and, if in the emergency manager’s sole discretion and judgment, a prompt and satisfactory resolution is

unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and state treasurer determine that all of the following conditions are satisfied:

- (i) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose.
- (ii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.
- (iii) Any plan involving the rejection, modification or termination of 1 or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.
- (iv) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

**C. Does Act 312 Apply To Public Employers Subject To A Consent Agreement Or In Receivership Under P.A. 436?**

1. **Prior Judicial Determinations. Under Public Act 4 – Issue Has Yet To Be Determined On Its Merits**
2. **Arguments Against Act 312 Applicability**
  - Section 14 of Act 312 states that it is “supplementary” to PERA. If the duty to bargain is suspended under P.A. 436 or PERA, then isn’t Act 312 accordingly inapplicable?
  - Section 13 of Act 312 requires that wages, hours and other conditions of employment “shall not be changed by action of either party without the consent of the other” during the pendency of Act 312 proceedings. Can a public employer in a fiscal emergency, and under state supervision, delay

necessary changes in wages, benefits or work rules pending prolonged Act 312 proceedings?

### 3. Arguments For Act 312 Applicability

- P.A. 436 does not expressly suspend Act 312 arbitration for employers subject to consent agreements or in receivership.
- Does the suspension of the duty to bargain in Section 15(1) also suspend Act 312, where non-union police or fire employees may be eligible to petition for Act 312? See: Section 4, providing:

“Within 10 days [after the filing of an Act 312 Petition]... the employees’ designated or selection exclusive collective bargaining representative, or if none, their previously designated representative in the prior mediation and fact-finding procedures, shall choose a delegate...

- Section 9 of Act 312, setting forth the “ability to pay” factors states that the arbitration panel must consider:

(v) Any law of this state or any directive issued under the local government and school district fiscal accountability act, 2011 P.A. 4, MCL 141.1501 to 141.1531, that places limitations on a unit of government’s expenditures or revenue collection. [now P.A. 436]

Why would the Legislature direct that Act 312 arbitrators consider directives issued under P.A. 436, if Act 312 is not applicable to employers under state supervision?

### D. If Act 312 Does Apply To Public Employers Subject To State Supervision Under P.A. 436, What Impact Do State Directives Have On The Award?

1. State directives under the City of Detroit’s Financial Stability Agreement – Annex D.
2. Section 8(1) of P.A. 436 provides that consent agreements “shall provide for remedial measures necessary to address the financial emergency within the local government and provide for the financial stability of the local government.”
3. Section 15(8) of PERA provides, in pertinent part:

“This act does not confer a right to bargain that would infringe on the exercise of powers under [P.A. 436].”

### E. Comparability In Determining Financial Ability To Pay – Are Communities Not Subject To State Supervision Comparable?

**F. Can Public Employers In Receivership Have Any "Ability To Pay" Union Wage Or Benefit Demands?**

**G. Must An Act 312 Award Include A Provision Permitting An Emergency Manager To Reject, Modify Or Terminate The Collective Bargaining Agreement?**

- Section 15(7) of PERA provides:

(7) Early collective bargaining agreement entered into between a public employer and public employees under this act shall include a provision that allows an emergency manager appointed under [P.A. 4, now P.A. 436] to reject, modify or terminate the collective bargaining agreement as provided for under [P.A. 4, now P.A. 436]. Provisions required by this subsection are prohibited subjects of bargaining under this act.

# **MERC ACT 312 and FACT FINDING TRAINING**

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## **BARGAINING/MEDIATION/ACT 312/ FACT FINDING PROCESSES IN A FISCAL EMERGENCY**

**By**

**Gordon A. Gregory**

GREGORY, MOORE, JEAKLE & BROOKS, P.C.  
65 Cadillac Square, Suite 3727  
Detroit, MI 48226  
313-964-5600  
[Gordon@unionlaw.net](mailto:Gordon@unionlaw.net)

## **I. Introduction**

Labor hailed passage of the Wagner Act (NLRA) in 1935 as its *magna carta*. Similarly, in 1965, public sector unions hailed PERA and proclaimed that they were going from collective begging to collective bargaining. The dream was realized and in the halcyon early days public employees made tremendous gains. Perhaps, in retrospect, they did too good of a job. But they had catch-up with the private sector, and many public employers were ill-equipped to deal effectively with collective bargaining.

It appears that K-12 teachers and their unions were the first to annoy and provoke the legislature into punitive action. The degree to which public employee rights have been eroded and restricted is the subject of a separate session at this Conference. Suffice it to say that the parties and the mediator/fact finder/arbitrator must be cognizant of legal limitations on the collective bargaining process.

No one needs to be told that we have been in a culture of concession bargaining resulting from the economy and to some degree the erosion of public support for public employees. Where bargaining was graded by wage and benefit gains, a pyrrhic victory is to avoid or minimize concessions.

When I accepted Ruthanne's gracious and flattering invitation to participate in this Conference, I did not have before me the challenging subject of this workshop. Having been a conference planner, I know how titles are promulgated, usually with the hope that the participants will figure out what to do and say. There is an old saying

applicable to bargaining in a "fiscal emergency." It goes, "when in danger, when in doubt, run in circles, scream and shout."

Of late, as public employers are quick to assert, most public sector bargaining occurs in a fiscal emergency, either current or projected. And the focus is on a reduction of employee wages and benefits while maintaining services. Thus, this paper discusses techniques and methods to deal with economic issues whether an emergency financial manager (EFM) has been appointed or such appointment is imminent. Indeed, the public employer may claim that a union's failure to concede will hasten such appointment and the imposition of draconian measures.

## **II. Traditional Preparation**

Preparation should begin well in advance of collective bargaining. Careful preparation will increase the chance of settlement in negotiations and/or mediation, and, of course, form the basis of later presentation in fact finding or compulsory interest arbitration.

The union membership should be polled for concerns, suggestions and priorities. But ultimately the bargaining committee must assign priorities with a back-off position for each issue.

Contract proposals should be realistic and limited to essential items or issues that have arisen during the term of the collective bargaining agreement.

Anticipate employer proposals and prepare draft responses.

Research comparable communities and other unions regarding wages, benefits, contract duration, finances and other relevant information.

Request information from the employer or EFM as is necessary and relevant for the union to prepare for and engage in collective bargaining.

File the MERC form on status of negotiations required by Section 7(2) of PERA. (MCL 423.207).

Review PERA, Act 312, and MERC rules and regulations to develop a general knowledge of the statutory regulation of the bargaining process.

### **III. The Bargaining Process**

Generally speaking, a fiscal emergency has not changed the statutory duty to bargain in good faith or the traditional use of negotiating tactics and procedures.

There are, of course, exceptions dictated by time and circumstances. I would consider them fact specific and often beyond the control of the parties. Among the exceptions considered are:

- two or more tiers of wages and benefits for new employees.
- employer demand to eliminate defined benefit pension plans and substitute a defined contribution plan.
- substantial shifting of health care costs to employees through co-pays, deductibles, benefit reduction and other.

### **IV. The Bargaining Process Extended**

While there may be studies I am unaware of, it is my impression from clients and colleagues that there are large numbers of contract settlements in fiscal emergencies short of fact finding or Act 312. This usually results in a mature labor management relationship with participants dedicated to problem solving rather than "I gotcha's."

Effective mediation deserves great credit for such results. Moreover, it seems that the cost, delay and uncertainty of fact finding and Act 312 promotes settlement.

Where the intervention of a neutral is inevitable in a fiscal emergency, unions have advanced various options pending a brighter day in the economic climate. Among the options are:

- concentrate on non-economic issues
- defer wage and benefit increases
- wage reopeners
- me too clauses
- grievance mediation as a step prior to arbitration
- insist that the employer and other employees share in concessions
- reduced work week
- provide for restoration of the status quo ante

A good example is the City of Pontiac where police, fire and other services were contracted out by the EM. The Pontiac Fire Department was merged with Waterford but the City retained ownership of fire halls and equipment. What happens when Pontiac gains financial stability and wishes to restore its fire department?

All of the above, and factors previously maintained, could be presented in fact finding or interest arbitration.

It is important to note that Act 312 was amended to require the arbitration panel to give the "most significance" to the public employer's "financial ability to pay." In reaching a decision the panel must consider the "financial impact on the community," and the "interests and welfare of the public." Moreover, the panel is charged vaguely to account for "all liabilities, whether or not they appear on the balance sheet of the unit of government." No small task!

Another union disadvantage provision in the amended Act is that the panel consider internal comparables of wages and benefits paid to non-312 eligible employees. Clearly such employees are not public safety and their occupations are not comparable to police and fire. A union should, of course, maintain that such internal comparables should include government officials, department heads and supervisors.

I submit that the ability to pay factor does not dictate the designation of comparable communities. Because a public employer is in a financial exigency for whatever reason, such as poor management, should not compel the arbitration panel to consider only comparable communities with similar financial circumstances. The financial exigency of the subject employer may go to ability to pay but not to the other comparison factors in Section 9 of the Act.

Whatever happened to the axiom that public employees should not be expected or required to subsidize the community?

#### **V. Emergency Manager Phenom**

Hopefully the appointment of emergency managers pursuant to the current Local Financial Stability and Choice Act is not contagious, and the impact of such Act on collective bargaining and interest arbitration will remain minimal. There are, however, unresolved legal questions which may affect the Act 312 process and implementation of the award.

I represented three unions during the course of the Pontiac emergency [financial] manager appointment. The unions were fire, supervisors and professional employees, and the EFM operated pursuant to P.A. 4. His actions are instructive.

The emasculation of collective bargaining agreements was accomplished in large measure through job elimination, early retirements, department reorganization and subcontracting. The police department was eliminated and the City contracted with the Oakland Sheriff to provide police services. Correspondingly, the fire department was closed, albeit fire stations were not sold, and the City contracted with Waterford Township to provide fire service other than EMS. For the most part, police and fire employees were hired by the contractor employers.

The EFM continued to bargain with the unions but with the omniscience of P.A. 4. Curiously, through counsel, in part, the EFM processed grievances, agreed to arbitration, and responded to unfair labor practice charges without claiming Act 4 rights.

For what appeared to be political, not financial reasons, the EFM attempted to reorganize the general City employee pension board to eliminate union representation. This produced sufficient outrage with the unions and retirees that the action was rescinded. Of note, however, is that the general employee and police/fire pension boards have divorced from City administration of the pension funds and now directly employ former City employees to administer the plan. The police/fire board has contracted with an outside agency to administer its plan.

Every effort was made in Pontiac to enforce that provision that now appears in Act No. 436 at Section 12(l) that the EM "Act as sole agent of the local government in collective bargaining ...." Where the Pontiac EFM failed to follow the conditions set forth

in Section 12(k) (i)-(iv) of the current Act, protests were filed with the State Treasurer to no avail. There was no response.

I am confident that unions will continue vigorously to press the fight to restore the halcyon purposes of PERA and Act 312.