STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY and WAYNE COUNTY SHERIFF,
Public Employers-Respondents,

Case No. D14 A-0018
-and- Act 312 Arbitration

AFSCME LOCAL 3317,
Labor Organization-Petitioner.
_____/

APPEARANCES:

The Allen Group, P.C. by Floyd E. Allen and Shaun P. Ayer, and Miller, Canfield, Paddock and Stone, P.L.C., by John H. Willems and Christopher Trebilcock, for Respondents

Jamil Akhtar for Petitioner

DECISION AND ORDER

This matter is before the Commission on the motion of the Employers, Wayne County and the Wayne County Sheriff, seeking dismissal of an Act 312 petition filed by the Union, AFSCME Local 3317. On September 1, 2015, the Employers filed their Motion to Dismiss Act 312 Arbitration and a supporting brief. On September 4, 2015, the Union filed its response to the Employers' motion. The Employers filed a reply brief on September 15, 2015.

Also on September 1, 2015, the Employers provided a copy of the Motion to Dismiss to the chairperson of the arbitration panel, C. Barry Ott, with a request that the proceedings be stayed until we reach a decision in this matter. On September 5, 2015, Chairperson Ott postponed the arbitration hearings until after we have issued our decision.

We considered this matter at our regular monthly meeting on October 16, 2015. At that meeting, both parties provided oral arguments in support of their respective positions.[1.] Having considered the parties' oral arguments as well as the materials filed

[1] The Commission rarely grants oral argument, which is discretionary with the Commission. Given the importance of the issue, the parties were permitted to make brief oral arguments despite the fact that neither

by the parties, we determined that there are no material facts at issue and that the motion to dismiss the Act 312 arbitration should be granted for the reasons discussed below.

The Parties' Positions

In their motion to the Commission, the Employers state that the County is in a state of financial emergency under the Local Financial Stability and Choice Act, 2012 PA 436, as amended, (Act 436), MCL 141.1541 – 141.1575, and entered into a consent agreement with the State of Michigan on August 21, 2015, pursuant to that Act. The Employers further state that they have no duty to bargain under § 15(1) of the Public Employment Relations Act (PERA), 1947 PA 336 as amended, MCL 423.215(1), as of September 20. 2015, 30 days after the date the County entered into the consent agreement. The Employers further assert that they are not willing to participate in Act 312 arbitration. Based on our decision in *City of Detroit*, 27 MPER 6 (2013), the Employers contend that they have no duty to participate in Act 312 arbitration and that the arbitration petition should be dismissed.

In its response to the Employers' motion, the Union argues that the consent agreement, under which the Employers seek to have the Act 312 arbitration proceeding dismissed, does not give the County the authority to stop an Act 312 proceeding. The Union also contends that nothing in § 8(10) and (11) of Act 436 prohibits the County from entering into an agreement with the Union to continue involvement in the Act 312 arbitration process. The Union also contends that the Employers' motion to stay the proceedings in this matter is untimely. The Union further asserts that the Employer contractually agreed to the arbitration process and, based on the doctrine of promissory estoppel, the Employers should be required to proceed with the Act 312 arbitration.

Factual Summary

We find the following facts based on the pleadings and exhibits submitted by the parties. Except as specifically noted, the following facts are not in dispute.

The petition for Act 312 arbitration was filed on August 19, 2014 by AFSCME Local 3317 (Union). The matter was referred to mediation, which ultimately proved unsuccessful. Therefore, on September 9, 2014, C. Barry Ott was appointed as the chairperson of the arbitration panel. After the parties' initial prehearing conference with

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party made a written request for oral argument. Rule 178 of the General Rules of the Michigan Employment Relations Commission, 2014 AACS, R 423.178 provides:

> If a party desires to argue orally before the commission, a written request shall accompany the exceptions, cross exceptions, or the brief in support of the decision and recommended order, and at the same time, the request shall be served on all other parties. The request must indicate "oral argument requested" in bold capital letters on the first page of the pleading under the caption. The commission, on its own motion, may also direct oral argument. The commission shall notify the parties of the time and place of oral argument. The commission may limit the time for oral argument by each party.

the panel chairperson, the parties agreed that terms of their collective bargaining agreement would be extended, and the Act 312 petition would be withdrawn until after the November 2014 election for the office of County Executive. The parties entered into a memorandum of agreement dated October 1, 2014, that provided that the Act 312 petition would be dismissed without prejudice, but may be refiled on a date after the November 4, 2014 general election but no later than December 15, 2014. The agreement further provided that the collective bargaining agreement would be extended in its totality until the Act 312 petition was refiled or December 15, 2014, whichever occurred earlier. The agreement further stated:

> All articles of the collective bargaining agreement which have been tentatively agreed to by the parties, shall remain off the table for the purpose of continuing collective bargaining. Upon re-filing, Case No. D14 A-0018 shall be reinstated and proceed to hearing as provided under the Act.

The parties subsequently amended the memorandum of agreement on December 12, 2014, February 17, 2015, March 13, 2015, April 22, 2015, and June 1, 2015. The amendments extended the collective bargaining agreement and extended the deadline by which the Act 312 petition could be refiled. The amendments also provided that all other provisions of the October 1, 2004 agreement would continue in full force and effect.

On June 22, 2015, the Union filed its request for reinstatement of the Act 312 petition. The arbitration was reinstated and on June 23, 2015, C. Barry Ott was reappointed as the chairperson of the arbitration panel. Following a prehearing conference on July 2, 2015, Chairperson Ott remanded the matter for 21 days of additional negotiations pursuant to § 7a of Act 312, MCL 423.237a. The parties negotiated with the assistance of a mediator, who notified Chairperson Ott on July 31, 2015, that the matter should proceed to arbitration. On August 10, 2015, Chairperson Ott sent notice to the parties confirming that they were to exchange last best offers by August 24, 2015, and that the arbitration hearings were to take place on several dates between September 10, 2015, and October 13, 2015.

On August 21, 2015, Wayne County entered into a consent agreement with the State Treasurer under § 8 of Act 436. The consent agreement provides in relevant part:

> 1. Remedial Measures. (a) The County shall implement the Remedial Measures necessary to address the financial emergency within the County and provide for the financial stability of the County, consistent with the requirements of this agreement. The parties intend the Remedial Measures to have the objective of assuring that the County is able to provide or cause to be provided governmental services essential to the public health, safety, and welfare and assuring the fiscal accountability of the County,
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> * * *

(c) In addition to and separate from powers retained by the County Commission and the County Executive under section l(b), the County Commission and the County Executive are hereby jointly granted the powers prescribed for emergency managers under section 12(1) of Act 436 and may exercise the powers using the same procedure under which a resolution is adopted by the County Commission, transmitted to the County Executive, and becomes effective and enforceable by the County Executive under the Charter, subject to the following:

(1) the County Commission and the County Executive may not jointly exercise powers prescribed for emergency managers under sections 12(1)(k), 12(1)(1), 12(l)(q), l2(1)(z), 12(1)(bb), and 12(1)(dd) of Act 436;

* * *

2. Employee Relations. (a) In addition to and separate from powers retained and granted under section 1, the County Executive is hereby granted the powers prescribed for emergency managers under section 12(1)(l) of Act 436 to act as the sole agent of the County in collective bargaining with employees or representatives and approve any contract or agreement.

(b) Consistent with section 8(11) of Act 436, beginning 30 days after the effective date of this agreement the County is not subject to section 15(1) of 1947 PA 336, as amended, MCL 423.215, for the remaining term of this agreement.

(c) Beginning 30 days after the effective date of this agreement, if a collective bargaining agreement has expired, the County Executive may exercise the powers prescribed for emergency managers under section 12(1)(ee) of Act 436 to impose by order matters relating to wages, hours, and other terms and conditions of employment, whether economic or noneconomic, for County employees previously covered by the expired collective bargaining agreement. Matters imposed under this section 2(c) will remain in effect for those employees until a new collective bargaining agreement for the employees takes effect under 1947 PA 336, as amended, MCL 423.201 to MCL 423.217, or other applicable law. The authority described in this section 2(c) is in addition to the powers retained and granted under sections 1 and 2(a).

* * *

> (f) Consistent with section 8(10) of Act 436, this agreement does not grant to the County Executive, the County Commission, or any other officer of the County the powers prescribed for emergency managers under section 12(1)(k) of Act 436.

Discussion and Conclusions of Law:

The Employers contend that, as of September 20, 2015, they have no duty to participate in Act 312 arbitration based on our decision in *City of Detroit*, 27 MPER 6 (2013). That case involved Act 312 petitions filed by three unions representing employees of the City of Detroit. The Act 312 petitions were filed and the arbitrators had been appointed in each case before 2012 PA 436 was enacted. After Act 436 was enacted, the State appointed an emergency manager for the City of Detroit and placed the City in receivership. Subsequently, the City of Detroit filed a motion to dismiss the arbitration petitions contending that the arbitrator lacked jurisdiction to proceed because of the suspension of the Employer's duty to bargain pursuant to § 27(3) of Act 436. Under those circumstances, this Commission found that "where an employer in receivership chooses not to participate in Act 312 arbitration they have no obligation to do so" and on that basis, held that the Act 312 petitions must be dismissed.

This matter is distinguishable from the *City of Detroit* case. We defined the main issue in that case as "whether the suspension of the duty to bargain pursuant to § 27(3) of the Local Financial Stability and Choice Act, Public Act 436 of 2012, MCL 141.1567(3), also suspends the authority of the Act 312 arbitrator in a pending arbitration." In the *City of Detroit* case, the city was in receivership. Section 27(3) provides, "A local government placed in receivership under this act is not subject to section 15(1) of 1947 PA 336, MCL 423.215, for a period of 5 years from the date the local government is placed in receivership or until the time the receivership is terminated, whichever occurs first." Act 436 defines receivership as "the process . . . by which a financial emergency is addressed through the appointment of an emergency manager." MCL 141.1542(q). Section 9 of Act 436 sets forth the qualifications for an emergency manager and the procedures for appointment. See MCL 141.1549. Under § 12(1)(k) of Act 436 an emergency manager may, if certain criteria are met, "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement."

In this case, the County is subject to a consent agreement entered into pursuant to § 8 of Act 436. Under § 8(11), "[u]nless the state treasurer determines otherwise," a local government that enters into a consent agreement is not subject to the bargaining requirements of § 15(1) of PERA, as of 30 days after entering into the consent agreement and continuing until the consent agreement expires. Therefore, under a consent agreement, immunity from the requirement to bargain in good faith pursuant to § 15(1) does not begin automatically and is subject to a finding by the state treasurer that said immunity is appropriate under the circumstances. See MCL 141.1548(11). Section 8 also provides that a consent agreement may grant the chief administrative officer or other officers of the local government one or more powers prescribed for emergency managers,

but specifically prohibits granting the powers prescribed for emergency managers under § 12(1)(k). See MCL 141.1548(10). Consistent with § 8, the consent agreement between Wayne County and the State provides: "this agreement does not grant to the County Executive, the County Commission, or any other officer of the County the powers prescribed for emergency managers under section 12(l)(k) of Act 436."

In *City of Detroit*, 27 MPER 6 (2013) we stated:

> Nevertheless, without reference to Act 312, § 12(1)(j) of PA 436 in conjunction with § 15(8) of PERA gives the Emergency Manager the right to reject, modify, or terminate terms of an existing collective bargaining agreement. Section 15(8) of PERA states:
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> > Collective bargaining agreements under this act may be rejected, modified, or terminated pursuant to the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531. This act does not confer a right to bargain that would infringe on the exercise of powers under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531.
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> Section 12(1)(j) of PA 436 states:
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> > (1) An emergency manager may take 1 or more of the following additional actions with respect to a local government that is in receivership, notwithstanding any charter provision to the contrary:
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> > * * *
> >
> > (j) Reject, modify, or terminate 1 or more terms and conditions of an existing contract.
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> In the light of the language of PA 436, we cannot find that the Legislature intended to impose the aforesaid "extraordinary restrictions" of Act 312 on an emergency manager. Inasmuch as an Act 312 award serves as the parties' collective bargaining agreement, it appears that pursuant to § 15(8) of PERA and § 12(1)(j) of PA 436 that the Emergency Manager could reject, modify, or terminate terms of an Act 312 award. If that is the case, it seems doubtful that the Legislature would have intended an employer in receivership, with no duty to bargain and with an emergency manager in place, to be subject to Act 312 arbitration proceedings.

However, upon review of this issue in the context of a consent agreement, it is evident that the key provision with respect to rejecting, modifying, or terminating one or

more terms of a collective bargaining agreement is not § 12(1)(j) of Act 436, which applies broadly to contracts entered into by a public employer. Instead, the key provision here, the one that applies to collective bargaining agreements, is § 12(1)(k).

Although neither PERA not Act 436 define collective bargaining agreement, § 15(1) of PERA defines collective bargaining as follows:

> [T]o bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

Thus, a collective bargaining agreement would be any written contract, ordinance, or resolution incorporating any agreement reached by the parties during the process of collective bargaining. Section 12(1)(k) specifically applies to collective bargaining agreements rather than contracts in general. It provides:

> 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:
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> > (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.
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> > (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.
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> > (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.

It is only the powers granted under § 12(1)(k) that are specifically reserved to emergency managers appointed pursuant to § 9 that permit the rejection, modification, or termination of one or more terms of an existing collective bargaining agreement. Accordingly, we adopt the reasoning that we applied in *City of Detroit*, with a modification to correct the statutory reference. Therefore, in the light of the language of Act 436, we cannot find that the Legislature intended to impose the extraordinary restrictions of Act 312 on an emergency manager. Inasmuch as an Act 312 award serves as the parties' collective bargaining agreement, it appears that pursuant to § 15(8) of PERA and § *12(1)(k)* of Act 436 that an emergency manager could reject, modify, or terminate terms of an Act 312 award. If that is the case, it seems doubtful that the Legislature would have intended an employer in receivership, with an emergency manager in place, and with no duty to bargain, to be subject to Act 312 arbitration proceedings.

However, in this case, the County is a party to a consent agreement and specifically lacks the powers granted under § 12(1)(k). Thus, the County does not have the authority to reject, modify, or terminate terms of an existing collective bargaining agreement or an Act 312 award. Nevertheless, as with an employer in receivership, the County now has no duty to bargain under § 15(1) of PERA. Section 10(1)(e) of PERA prohibits public employers that have a duty to bargain from refusing to bargain collectively with the representatives of their employees. However, if their duty to bargain has been suspended, their refusal to bargain does not violate § 10(1)(e). Quite simply, there can be no breach of duty if there is no duty. See, *City of Detroit*, 27 MPER 6 (2013). Despite the difference between this matter and the *City of Detroit* case, we find the Employer's duty to participate in Act 312 arbitration is dependent upon its duty to bargain.

As we explained in *City of Detroit*, 27 MPER 6 (2013):

> In *Metropolitan Council 23, AFSCME v Center Line*, 414 Mich 642 (1982), the Court inferred from PERA that the distinction drawn between mandatory and permissive subjects of bargaining determines the scope of the Act 312 arbitration panel's authority. Given the fact that Act 312 supplements PERA and that under § 15 of PERA the duty to bargain only extends to mandatory subjects, the Court concluded that the arbitration panel can only compel agreement as to mandatory subjects. The Court noted further that it would be inconsistent to conclude that the arbitration panel can issue an award on a permissive subject when the parties do not even have a duty to bargain over such a subject. Based on that, we might infer that the arbitration panel has no authority over matters for which there is no duty to bargain.

The mediation process is a condition precedent to initiation of Act 312 arbitration. See § 3 of Act 312, MCL 423.233. A public employer that has no duty to bargain has no duty to participate in mediation. Only a public employer whose duty to bargain has not been suspended under Act 436 or a labor organization may be required by this Commission under § 10 of PERA to participate in mediation. Moreover, § 7a of Act 312, MCL 423.237a, authorizes the arbitration panel chair to remand the matter to mediation. Since there is no duty to participate in mediation unless there is a duty to bargain, it is evident that § 7a of Act 312 presupposes the presence of a duty to bargain. As we indicated in *City of Detroit*, "the duty to bargain must be present before a party can be compelled to involuntarily participate in mediation. If parties have no duty to participate in mediation, they cannot be required to participate in Act 312 arbitration."

Petitioner's Arguments Against Dismissal of the Act 312 Petition

Petitioner alleges that the parties' agreement for dismissal of the Act 312 petition without prejudice and on the condition that the petition could be refiled later, was entered into at the urging of the Employers. Petitioner contends that the October 1, 2014 memorandum of agreement was prepared by the Employers and provided to Petitioner with a promise that the Union would continue to have the right to go to Act 312 arbitration under the terms of that agreement. Based on that information, the wording of the October 1, 2014 memorandum of agreement, the amendments to that memorandum of agreement, and a September 30, 2014 letter from Kenneth S. Wilson, the County's Deputy Director of Personnel/Human Resources and Director of Labor Relations, that accompanied the unsigned draft of the October 1, 2014 memorandum of agreement, Petitioner contends that the Employers contractually agreed to complete the Act 312 arbitration process that was initiated with the filing on August 19, 2014.

If we assume the facts to be as alleged by Petitioner, we might find that the parties had a contractual agreement wherein Petitioner agreed to withdraw the Act 312 petition in exchange for the County's promise that the Act 312 proceeding would continue upon refiling by Petitioner within the time frame set forth in the October 1, 2014 memorandum of agreement and its subsequent amendments. However, the October 1, 2014 memorandum of agreement and its subsequent amendments were entered into prior to the consent agreement between the County and the State of Michigan. The consent agreement gives the County the powers of an emergency manager under § 12(1) of Act 436, with the exception of those powers that are expressly excluded. The consent agreement specifically states that the County does not have the powers under § 12(1)(k); therefore, the County has no authority to set aside an existing collective bargaining agreement during the term of that agreement. However, the County does have the power under § 12(1)(j) of Act 436 to "[r]eject, modify, or terminate 1 or more terms and conditions of an existing contract." While the October 1, 2014 memorandum of agreement may be related to collective bargaining, it is not a collective bargaining agreement. It is a contract, which the County has the power to "reject, modify or terminate" pursuant to § 12(1)(j).

Petitioner also contends that the doctrine of promissory estoppel applies and that it requires the Employers to honor their promise to proceed with the Act 312 arbitration upon timely refiling by the Petitioner. Restatement (Second) of Contracts § 90 (1981) provides:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Even if we were to assume the facts to be as alleged by the Petitioner, that would not give us the authority to interfere with the rights and obligations that the County has assumed upon entering into the Act 436 consent agreement for the purpose of taking remedial measures to address the County's financial emergency.

Petitioner also contends that § 13 of Act 312 requires the continuation of terms and conditions of employment contained in the parties' collective bargaining agreement after a petition for Act 312 has been filed. Although that is true when an employer is neither in receivership nor subject to a consent agreement, it is not true in this case. As of 30 days after the effective date of the consent agreement, if the parties' collective bargaining agreement has expired, the County may impose new terms and conditions of employment for employees previously covered by the expired collective bargaining agreement by virtue of the powers given to the County in the consent agreement pursuant to § 12(1)(ee).

Finally, Petitioner argues that the Employers' motion to dismiss the arbitration should be denied because it was not filed within 60 days of the date the arbitration chair was reappointed. Petitioner contends that the Employers' motion to dismiss the Act 312 arbitration is an appeal and the letter reappointing the chair of the arbitration panel is an appealable order. Petitioner is incorrect in both respects. The Employers' motion to dismiss is not an appeal since it does not challenge the correctness of a ruling or order. No error in the reassignment of the arbitration panel chair has been alleged by the Employers. Moreover, if we were to consider the letter reassigning the chair to be a ruling or order, at most, it would be an interlocutory ruling from which an appeal would be premature. Contrary to Petitioner's argument that the Employers are attempting to appeal, the Employers have asserted that they no longer have a duty to participate in Act 312 arbitration because they no longer have a duty to bargain and choose not to participate in Act 312 arbitration. As we indicated in the *City of Detroit* decision, where an employer no longer has a duty to bargain pursuant to Act 436, the employer may choose to voluntarily participate in Act 312 arbitration, but the employer cannot be compelled to do so.

In conclusion, we find that the Employers in this matter are subject to a consent agreement under Act 436 that suspended the County's duty to bargain as of September 20, 2015. The Employers have expressed an unwillingness to bargain or participate in

Act 312 arbitration in light of Act 436. As such, as of September 20, 2015, the Employers cannot be required to participate in Act 312 arbitration. Accordingly, the Act 312 arbitration in the case before us must be dismissed as of that date.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

The Employers' motion to dismiss the Act 312 arbitration is granted. The Act 312 arbitration is hereby dismissed as of September 20, 2015.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: October 16, 2015