STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH
MICHIGAN EMPLOYMENT RELATIONS COMMISSION (MERC)
ARBITRATION

IN THE MATTER OF:

POLICE OFFICERS LABOR COUNCIL
(SERGEANTS),
Union

MERC ACT 312
Case No. D08 A-0098

and

CITY OF ADRIAN,
Employer

ARBITRATOR'S AND PANEL CHAIRPERSON'S
INTERIM DECISION

APPEARANCES:

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I. INTRODUCTION.

The City of Adrian, (hereinafter referred to as the "City") and the Police Officers Labor Council (hereinafter referred to as the "Union") have been parties to a Collective Bargaining Agreement for the Sergeants employed by the City. The most recent Collective Bargaining Agreement between the City and the Union terminated on or about June 30, 2008. The parties have stipulated that the new Collective Bargaining Agreement shall be retroactive to July 1, 2008, and depending on which Last Best Offer is ultimately selected, will terminate on July 1, 2012, 2013, or 2014. On July 6, 2011, a Prehearing Conference was conducted and subsequently a Prehearing Status Report was issued on July 13, 2011.

The Hearing on all of the issues took place on September 20, 2011. At the outset of the Hearing, the City, through its counsel, stipulated that the panel had jurisdiction over all of the issues, with the exception of a potential issue regarding the unilateral selection by the City of insurance contributory payment by the Employees in the Bargaining Unit. At that time counsel for the City pointed out that Michigan Senate Bill 7 had passed both houses of the legislature, but had not yet been signed by the Governor. Subsequently, post-hearing, the Governor did in fact sign enrolled Senate Bill No. 7, which became Act No. 152 of the Public Acts of 2011. The Governor signed the Act on September 24, 2011, it was filed with the Secretary of State on September 27, 2011, and contains an effective date of September 27, 2011, although in Section 5(2) it refers to collective bargaining agreements or other contracts that are executed on or after September 15, 2011, which are prohibited from including terms that are inconsistent with the requirements of Section 3 and 4.

The counsel for the City further contended that if the legislation became law, which it did, any exercise of the City rights pursuant to the legislation would not constitute a mandatory subject of bargaining, and accordingly, the arbitration panel would not have jurisdiction in the event that the City chose to exercise one of its rights pursuant to the legislation.

At that time, counsel for the Police Officers Labor Council did not articulate a position insofar as the Union was concerned with regard to the position set forth by counsel for the City.

Subsequently, after the passage of the Act, correspondence was received from counsel for the City and from counsel for the Union. At that time the parties were directed to submit Briefs with regard to the issues of whether or not the provisions of the Act are subject to mandatory bargaining and when a Collective Bargaining Agreement is considered to have been executed when the provisions of the Collective Bargaining Agreement are subject to an Act 312 proceeding. The parties did in fact submit timely Briefs and the purpose of this Decision is to supply the parties with answers to the two issues briefed and a third issue which was not briefed since it did not seem to be relevant at that point in time, but may become relevant based upon when a final decision in this case is issued and when a new Collective Bargaining Agreement is executed.

Act No. 152 of the Public Acts of 2011 defines a local unit of government as "a city, village, township, or county***."

The relevant sections insofar as this Decision is concerned are found in Sections 3, 4, and 5 of said Act. Section 3 provides that a public employer (a city) that offers or contributes to a medical benefit plan for its employees or elected public officials is prohibited from paying any more of the annual costs or illustrative rate, and any reimbursement for co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs, then a total amount equal to $5,500 times the number of employees with single person coverage, $11,000 times the number of employees with individual and spouse coverage, plus $15,000 times the number of employees with family coverage, for a medical benefit plan coverage year beginning on or after January 1, 2012. In addition, it allows the public employer to allocate the payments as hereinabove set forth for medical plan costs among its employees and elected public officials as it sees fit. Accordingly, the public employer would have to multiply the number of employees in each of the three categories in order to arrive at a gross lump sum of costs. Those costs can then be allocated among the employees as the employer sees fit without regard to the individual three hard cap costs hereinabove noted. In addition, Section 3 has a cost of living provision for each year after 2011.

Section 4 of the Act, acts as an exception to Section 3 if a majority vote of the governing body of a public employer (in this case, the City Council of the City of Adrian) elects to comply with the provisions set forth in Section 4(2) which essentially allows a public employer to ignore the hard caps set forth in Section 3 and instead provide for a plan in which the employer does not pay more than 80% of the total annual costs of all the medical benefit plans it offers or contributes to for its employees and elected public officials. Essentially, this has been referred to as the "80-20" plan. The plan specifically includes, as a cost to be determined by the employer, beneficiary-paid co-payments, co-insurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments that are made into health savings accounts, flexible spending accounts or similar accounts used for healthcare. Section 4 also contains a provision similar to Section 3 allowing the employer to allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit. Accordingly, as long as the employer comes up with a plan in which it pays no more than 80% of the costs, the remaining 20% can be allocated among the employees on a non-equal percentage basis. Thus, for example, an employer could have one group of employees paying a lesser or greater rate than the 20% that the employees would pay if the employers simply assumed 80% of the costs.

Finally, Section 5A(1) provides that where there is a pre-existing collective bargaining agreement, which is inconsistent with Section 3 or Section 4, on the effective date of the Act, which as previously noted was September 27, 2011, the provisions of Sections 3 and 4 are not applicable until the collective bargaining agreement expires. Section 5 also provides that the expenditures by an employer for medical benefit plans under a pre-existing collective bargaining agreement are excluded from the calculation of the public employer's maximum payments as required under Section 4. Section 5 further specifies that the requirements of

Section 3 and 4 apply to any extension or renewal of a collective bargaining agreement. As previously noted, Section 5(2) provides that a collective bargaining agreement or other contract that is executed on or after September 15, 2011, must comply with the terms of Act 152.

II. DO THE PROVISIONS OF ACT 152 CONSTITUTE MANDATORY SUBJECTS OF BARGAINING?

The City and the Union take diametrically opposed views as to whether or not the Sections hereinabove set forth are subject to mandatory bargaining. Both parties cite the provisions of Act 336 of the Public Acts of 1947, commonly referred to as the Public Employment Relations Act. Among other Sections of P.E.R.A., Section 15 provides for the duty of a public employer to bargain collectively with the representatives of its employees with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement, and further requires the execution of a written contract, ordinance or resolution incorporating any agreement reached between the parties. Commonly wages, hours, and conditions of employment are referred to as mandatory subjects of bargaining. When there is a mandatory subject of bargaining neither side can take unilateral action without having bargained on the subject and either an agreement has been reach, or in limited cases, the parties have reached impasse. Counsel for the City has set forth a number of separate arguments setting forth the proposition that the provisions of Act 152 do not constitute mandatory subjects of bargaining. It is uncontested that the provisions which make up a health care insurance plan or health savings plan such as whether or not there is drug coverage, and what the amounts of the various deductibles or co-pays may be, constitute mandatory subjects of bargaining. I do not believe that there would be any argument that prior to the enactment of Public Act 152, the amount of contribution by an employee versus the amount of contribution by an employer would also have constituted a mandatory subject of bargaining. However, the employer, through its counsel, maintains that the provisions of Act 152 rather than constituting mandatory subjects of bargaining are at best, permissive and/or illegal. The employer notes that the statute clearly contemplates that each public employer is to make one choice between the hard-cap, the 80/20 provision, or the opt-out option, and that those choices apply to every employee that is covered by medical insurance or a medical plan. The employer further notes that pursuant to Section 4(1) of the Act, the election of an 80/20 option states that it shall be made by a majority vote of its governing body and that the public employer "may elect" to comply with Section 4 in preference to the hard-caps set forth in Section 3. In addition, the employer notes that Section 8(1) allows the governing body of a local unit of government to opt out of the requirements of Section 3 and/or 4 of the Act in each calendar year.

For its third argument, the employer notes that the Act applies on the first medical benefit plan coverage year occurring after January 1, 2012, for which there is no collective bargaining agreement in force as of the effective date of the Act. The employer queries what would happen if bargaining is not concluded by January 1, 2012. It then states that if the choice is a mandatory subject of bargaining, the public employer could not unilaterally make such a choice, and accordingly, would be in violation of the provisions of Public Act 152, which require the employer to make an election between Sections 3, 4, and 8 of the Act.

For its fourth argument, the employer states that since the Act contains the words "as it sees fit" with regard to the proration of the costs among the various employees in the various collective bargaining and non-union units, it would seem to be clear that that imparts discretion to the employer and accordingly, would not be subject to the collective bargaining process insofar as a mandatory subject is concerned.

The fifth position set forth by the employer does not directly relate to this bargaining unit. However, the employer analogizes that with respect to courts, whether or not the 80/20 option is selected, must be made by a "Designated State Official". That State Official would be the state court administrator. However, with respect to collective bargaining, each individual court (circuit, district or appellate) has as its chief negotiator, the Chief Judge of the Court. The state court administrator is not involved in the collective bargaining process. Nor is the state court administrator the employer of any of the individual court employees. Thus, counsel for the employer queries, "how could such a non-employer have a bargaining obligation?"

For its sixth position, the employer notes that pursuant to Section 6 of Public Act 152, an employer may condition an employee's receipt of health insurance upon the employee's authorization to have amounts deducted from his/her paycheck. As contrasted with Section 7 of the Michigan Payment of Wages and Fringe Benefit Act, which provides for no deduction from an employee's paycheck unless it is expressly permitted by law or by a collective bargaining agreement. The employer notes that if such bargaining was required by Public Act 152, deductions would be authorized by the collective bargaining agreement and as such, individual employee authorizations would not be necessary under Section 7 of the Michigan Payment of Wages and Fringe Benefits Act.

The employer, while noting that the appellate decisions with regard to P.E.R.A. indicate that it is the dominant law regarding labor relations and supersedes other state statutes, that authority has been called into question when dealing with statutes similar to Public Act 152, which were enacted after P.E.R.A. The employer dismisses the line of cases in which the courts held that P.E.R.A. was the dominant law as it pertains to statutes which existed prior to the enactment of P.E.R.A. It notes that the legislature could not have had P.E.R.A. in mind when it enacted conflicting statutes prior to the inception of P.E.R.A. and prior to the concept of public employee collective bargaining. (See Kalamazoo Police Supervisors Association vs. City of Kalamazoo, 130 Mich.App. 513,(1983).

The Union, on the other hand, contends that the provisions of Public Act 152 did not impact the mandatory bargaining status of health care costs between the City and the Union. The Union maintains that the Act serves to elucidate health care options, which the State made available for negotiation at the bargaining table. While it notes that Act 152 gives employers a choice of three health care cost sharing options, it also maintains that those choices are mutual to the employer and the bargaining unit. The Union believes that as long as the employer has a choice as to what cost sharing options it can offer the employees, the employees retain a mandatory right to bargain over which option is chosen. It notes that there is no specific prohibition against employees bargaining with employers over the three options within the confines of Public Act 152.

The Union further notes that the hard caps contained in Section 3 are but one option, and that the legislature has given the employer two other options, therefore the State did not mandate that a local government implement the hard cap plan. Thus, it concludes that it is but one of three options which municipalities now have to choose from at the "bargaining table". The Union believes that since two other options are available, those options become mandatory subjects of bargaining, apparently along with the first hard cap option.

With respect to Section 4, the Union again notes that no specific language removes the 80/20 option from the mandatory bargaining table. It opines that the language of that section serves to put bargaining units on notice that there is an alternative over which to bargain. Thus, with respect to Section 4, the Union concludes that the City does not have to submit to the language in Section 3 and relinquish their contractual rights to engage in mandatory bargaining.

Next, the Union points to the provisions of Section 8, the 2/3 vote of the governing body to exempt itself from the requirements of the Act and concludes that since the City has the ability to exercise discretion with regard to the opt-out provision, the determination of the adoption of the health care cost sharing plan remains a mandatory subject of bargaining. The Union believes that the parties could enter into a collective bargaining provision which provides that the City would agree to vote each year to exempt itself from the provisions of the Act and choose a health care cost sharing option that best fits its economic situation. It further states that opting out of the Act would allow the City, if it has already adopted a balanced budget, or is in the midst of arbitrating contracts, outside of the influence of the Act to maintain their responsible budgets and protect them from potential litigation from other entities that could cause undue harm to taxpayers and employers by engaging in collective bargaining.

The Union notes that the Senate Fiscal Agency's analysis of the relevant Sections of the Act, states that the Bill will impose certain limits on the portions of employee's medical benefit plan coverage paid for by public employers. However, it does not state that the intent of the legislation is to mandate a specific health care sharing plan rendering the mandatory bargaining status of health care costs null and void. It further notes that the analysis in reference to Section 3 and 4 indicates that public employers "could pay" and "could elect", and under Section 8 a local unit of government "could exempt itself". The Union concludes that that language clearly indicates a permissive intent. Thus, according to the Union, the statute clearly and unambiguously provides three health care cost sharing options over which the parties must bargain rather than a mandate for a city to adopt a specific plan at the expense of employees' collective bargaining rights. The Union believes that there is nothing in the statute which would prohibit the City from entering into a collective bargaining agreement with the Union which would provide that the City would commit its vote each year to institute/maintain the 80/20 split or in the alternative to vote to exempt themselves from the provisions of the Act all together. Thus, as long as the City has the choice of options, according to the Union, the City must continue to bargain over which of the choices will be instituted.

Finally, with respect to this issue, the Union, as did the employer, notes that P.E.R.A. is the dominant law regulating public employee relations in the State of Michigan. It notes that the supremacy of the provisions of P.E.R.A. are predicated on the Michigan Constitution (Constitution 1963, Article 4, Section 48) and what it terms to be the apparent legislative intent that the Act be the governing law for public employee labor relations. Since, according to the Union, P.E.R.A. provides health care costs are mandatory subjects of bargaining, the provisions of Public Act 152 merely provide an employer with options which are bargainable, but which do not grant the employer the unilateral right to usurp the bargaining obligations set forth in P.E.R.A.

Due to the newness of the Act, it is clear that this constitutes a case of first impression insofar as the Act itself is concerned. There are not court decisions nor decisions from the Michigan Employment Relations Commission which act as guideposts with respect to the issue of whether or not the provisions of Public Act 152 constitute mandatory subjects of bargaining. I find it regrettable in the first instance that the state legislature and Governor have chosen to attempt to mandate provisions which, prior to the inception of Act 152, clearly would have been considered to be mandatory subjects of bargaining. The Governor and the legislature have placed their noses under the tent of collective bargaining labor relations and accordingly, have attempted to impose upon employees' costs, which would otherwise have been bargainable. Nevertheless, as an Arbitrator and Panel Chairperson, I am obligated to follow the decisions of the Appellate Courts of the State of Michigan, as well as the decisions of the Michigan Employment Relations Commission, and the statutory provisions enacted by the Legislature, unless and until such time as those provisions are deemed to be either illegal or unconstitutional.

I do not believe that the decisions with regard to the dominance of P.E.R.A. are applicable in this instance. Clearly, the past decisions referred to instances where a pre-existing statute to

P.E.R.A. was determined to be either unlawful or inapplicable based upon the finding that P.E.R.A., being the dominant law of the State of Michigan, with respect to labor relations, should be given pre-eminence over any pre-existing legislation, since at the time of the passage of pre-existing legislation the Acts clearly were not intended to apply to situations involving the collective bargaining process.

There can be no question that the provisions of Section 3, 4, and 8 are discretionary and are to be determined by the local governing legislative body, which in the case of the City, is its City Council. If that discretion were to be subject to the collective bargaining process, the City Council would no longer have absolute discretion. If the parties were to bargain and not reach an agreement which would be more than likely if the City stood by either Section 3 or Section 4 of the Act, it would, if a mandatory subject of bargaining, eventually wind up in the case of police, fire departments and other units, subject to Public Act 312, 1969, in binding arbitration. At that point, the parties would be obligated to present their Last Best Offers. It would be foolish to believe that the City, if it hadn't reached an agreement in the collective bargaining process, would deviate from its choice of either Section 3 or Section 4. It would be equally foolish to believe that the Union would not choose, as its Last Best Offer, the opt out provisions of Section 8. In the event an arbitration panel were to select the opt out provisions of Section 8, there would have to be an additional finding as to how much the City and the individual employees were going to pay for the health care coverage. I do not believe that it was the legislative intent that the Act 312 panels should make that determination in light of the provisions of Act 152.

Moreover, the Union argument that a provision in a collective bargaining agreement could bind the City Council to vote for a particular provision, be it Section 3, Section 4, or something else in succeeding years in order to comply with the Act, and presumably the "something else" would be the opt out provision, simply is contrary to municipal law. As a general rule, a City Council cannot bind future City Councils by their acts. However, under the Union proposal, it would seem that if there were elections during the term of a collective bargaining agreement, the Union would have the choice, as determined at the bargaining table, or by an Act 312 panel, to be binding upon the current City Council and to require a future City Council which may not be made up of the same membership to continue to vote for the opt out provision or whatever division of costs are negotiated between the Union and the City. I do not believe that that would be permissible.

Public Act 152 is constructed in such a manner as to make the hard caps mandatory, unless one of two events occurs. First, in order to opt out of the hard caps, the employer is given the option to elect to pay no more than 80% of the total costs. That can only occur by a majority vote of its governing body, and in my opinion, cannot be the subject of mandatory bargaining due to the fact that only the governing body is given the option to elect to comply with the provisions of Section 4. In addition, it is the public employer who is given the discretion to allocate the employees' share of total annual costs of the medical benefit plans among its various employees "as it sees fit". Clearly, the phrase "as it sees fit" in my opinion, imparts total discretion to the employer. In lieu of any requirement to bargain those costs with one or more unions.

Section 5(2) clearly prohibits a collective bargaining agreement from including terms which are inconsistent with the requirements of Section 3 and 4. Since, in my opinion, those Sections vest total discretion within the legislative body of the public employer an agreement to opt out of those provisions can only be made by the public employer at its discretion and not across the bargaining table or by imposition of an Act 312 award.

If a public employer wishes to bargain with a union over the provisions of the Act, there is an avenue. The avenue is contained in Section 8, which allows the employer to exempt itself from the requirements of the Act for the next succeeding year by a 2/3 vote of its governing body. In the event that that occurred, it is my opinion that the employer would then be obligated to bargain with the union over the cost sharing provisions of a health care plan. But whether or not the governing body elects to utilize the provisions of Section 8, in my opinion, lies totally within the discretion of the governing body.

Accordingly, it is my opinion that the provisions of Public Act 152 do not constitute mandatory subjects of bargaining and are not subject to the Act 312 proceedings, except as insofar as the time which the employer may impose the provisions of Sections 3, 4, or 5, upon the bargaining unit. That issue will be discussed subsequently in this Opinion.

III. WHAT IS THE DATE OF EXECUTION FOR PURPOSES OF DETERMINING WHETHER OR NOT THE CONTRACT WAS EXECUTED BEFORE THE EFFECTIVE DATE OF THE ACT?

The parties were also asked to brief the issue of when the contract, which is the subject of these proceedings, is deemed to have been executed. Since the contract is retroactive to July 1, 2008, there are a number of dates upon which the contract theoretically could be deemed to have been executed, which in turn, impact the date upon which the provisions of Act 152 may be implemented. For example, based upon the retroactive nature of the contract, the date of execution could be deemed the first date of the contract, or in this case, July 1, 2008. The date of the execution of the contract could also be deemed to be the date of the issuance of the Act 312 award, or the date of execution of the contract could be deemed to be the date upon which the parties actually sign the agreement, subsequent to the issuance of the award. The thrust of this issue is apparent. In the event the date of the execution of the award were to be deemed the first date of the contract, July 1, 2008, the contract would not be subject to the terms of Public Act 152, by virtue of the provisions set forth in Section 5(2), which only refer to collective bargaining agreements or contracts that are executed on or after September 15, 2011, which in turn are prohibited from including terms that are inconsistent with the requirements of Sections 3 and 4. Clearly, the legislature allowed collective bargaining agreements to remain in full force and effect which were executed prior to September 15, 2011 with respect to the sharing of insurance health care plan costs. It should be noted that there is no argument that the current case was within the Act 312 procedures prior to the passage of Public Act 152.

The employer argues that the provisions of Sections 5(1) and (2) clearly supply the answer. If the collective bargaining agreement is in effect prior to September 15, 2011, the provisions of Act 152 would not be applicable until that contract term expires. On the other hand, if the contract is not in effect until after September 27, 2011, and has not been executed until after September 15, 2011, the provisions are not applicable, and the provisions of Act 152 can be imposed by the City, effective January 1, 2012. The City maintains that clearly the collective bargaining agreement was not in effect on September 27, 2011, otherwise, there would be no need for this proceeding. The legislature did not exempt, according to the City, collective bargaining agreements that were being negotiated or in the Act 312 pipeline as of the effective date of Public Act 152. In addition, the City notes the case of the City of Wyandotte, in which the Michigan Employment Relations Commission held that that an effective date of a collective bargaining agreement was not synonymous with the date to which the contract was made retroactive.

The Union's position contends that the Act should not be applied retroactively to the party's collective bargaining agreement. It notes that the contract expired in 2008, long before Public Act 152 was contemplated and/or passed into law, and that contract negotiations began over three years ago. It further notes that the case was in the arbitration pipeline long before Public Act 152 became law. It believes that forcing new health care cost sharing legislation on a retroactive contract would create a new and unforeseen financial obligation on the parties that are involved in the contract. It does not believe that the employees should be forced to accept

terms that have not been bargained for and could not have been bargained for at any time during the three year negotiating process, which in turn damages the bargaining rights of the Union. It believes that allowing Public Act 152 to apply to the contract would negate the entire 312 arbitration process and nullify the bargaining rights of the parties. The Union argues there is nothing suggesting a legislative intent that the statute should be applied retroactively to collective bargaining contracts. It notes that the legislature did not use the magic words "this Act shall be applied retroactively" as it has in other statutes. It believes to allow the imposition of Act 152 would penalize the parties for entering into compulsory arbitration as opposed to having negotiated an agreement prior to the effective date of the Act. It notes that the Act clearly is prospective based upon the fact that Section 3 pertains to medical benefit plan coverage years beginning on or after January 1, 2012.

There are basically two parts which must be determined in order to resolve this issue. The first is when the Act, if allowed to be imposed, will occur, and the second is whether or not the contract will have been deemed to have been executed prior to the effective date of the Act. I do not believe that the Act can be retroactive. It only applies to contracts which were executed on and after September 15, 2011. There may be a question based upon the two conflicting dates in the Act, which are the effective date of September 27, 2011 and the retroactive date of September 15, 2011, which would in fact constitute a retroactive period of twelve days. However, that particular issue is not before me.

It is my belief that the Act insofar as this case is concerned, even if imposed on or after January 1, 2012, would be prospective and not retroactive. The mere fact that the contract relates back to an earlier period of time does not mean that the imposition of PA 152 is retroactive since the costs incurred would only take place after January 1, 2012.

With respect to the date upon which the contract is deemed to have been executed, it is my belief that the Michigan Employment Relations Commission has resolved that issue in the City of Wyandotte Police Department and Command Officers Association of Michigan and Police Officers Labor Council, Wyandotte Lodge, 111, Command Officers Bargaining Unit, Case No. R98-I-113. In that case, the Commission noted,

> "The Statute provides that the 'execution' date of a new contract is the beginning of the bar period. This language rules out any of the other proposed dates in this case. Had the legislature wanted to use the 'retroactive' and/or 'effective' dates when they are different from the 'execution' date as the beginning date for contract bar purposes it would have explicitly indicated as such. The terms 'retroactive', 'effective', and 'execution', are terms well understood in labor relations law, as evidenced by the NLRB's long-standing treatment of the terms. Moreover, there is an additional reason to the adhering to the generally accepted meaning of the term 'execution'. Prior to execution, there is nothing to give parties to representation cases any guidelines for the filing and processing of third-party representation petitions. In this case, the effective and execution dates were, by the terms of the contract, the same, but

> had they been different, then the execution date would have to control under the clear statutory language.
>
> Finally, some comment must be made relative to the alternative argument that the date of the arbitrator's award was the date of 'execution'. Aside from the fact that this assertion does not conform to the literal wording of the statute, there was no complete written contract when the award issued, as this commission has always required. See example, Armada, supra, and Sterling Township, supra. The compulsory arbitration award typically sets forth the rulings on the issues presented to arbitration, one party winning and the other party losing based on their last offers, but a complete contract has to be drafted, assembled, executed by both parties, and/or implemented. Until the actual agreement, which is made up of the items voluntarily agreed to in collective bargaining, plus the issues taken to arbitration and ordered by the arbitration panel, is executed by both parties, as required by Section 14, there is no contract in existence upon which to find a bar."

Accordingly, it is my opinion, based upon the Wyandotte case, that the contract under consideration has not been executed as of this date, nor when it is executed, subsequent to the issuance of the award, will the execution be retroactive to the effective date of the contract.

IV. WHEN MAY THE CITY IMPLEMENT THE PROVISIONS OF PUBLIC ACT 152?

This issue was not briefed by the parties since I did not consider it to be relevant at the time that I requested their initial Briefs. However, since it is unlikely that the award will be issued and that a new contract will be executed prior to January 1, 2012, it becomes relevant to determine when the City, assuming it has elected a choice under Public Act 152, will be able to institute its choice, be it the hard caps, the 80/20, or opting out of the provisions of Sections 3 and 4 of the Act.

At the outset, it should be noted that Section 13 of Public Act 312, 1969, provides:

> "During the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other, but a party may so consent, without prejudice to his rights or position under this Act."

In addition, the Michigan Constitution in Article I, Section 10 provides,

> "No bill of attainder, expo facto law or <u>law impairing the obligation of contract shall be enacted."</u>

Clearly, Section 13 of Act 312 requires all of the provisions of a collective bargaining agreement to continue in full force and effect during the pendency of the 312 proceedings. Thus, at this point in time, the contract which had a termination date of June 30, 2008, continues to remain in full force and effect. That is true of all of its wages, hours and conditions of employment, including the provisions which are applicable to the payment of the health insurance and health care plans. Thus, for example, if currently the employees in this bargaining unit pay 5% of their health care insurance and/or health care plans, and the employer pays 95%, under the terms of Act 312, those pro-rations would continue in full force and effect until the issuance of an award and the execution of a collective bargaining agreement. There is nothing in Public Act 152 which in any way could be deemed to be an explicit repeal of Section 13 of Act 312 or an amendment of Section 13 of Act 312.

Likewise, had the legislature not indicated that existing collective bargaining agreements would remain in full force and effect with respect to the provisions contained in Public Act 152 until their termination date, which could be several years from now, the legislation, if it attempted to disrupt those collective bargaining agreements clearly would run afoul of Article I, Section 10 of the Michigan Constitution.

I believe that the case law in Michigan is clear on this point:

> "Contracts fixing status of parties cannot be changed by legislative fiat, Globe & Rutgers Fire Insurance Company of New York vs. Fisher (1926) 207NW 884 234 Mich 258."

In the case of Seitz vs. Probate Judges Retirement System (1991) 474 NW2nd 125, 189 MichApp 445, appeal denied 482 N.W.2nd 459, 439 Mich 946, the Court stated,

> "The contract clauses of state and federal constitutions provide that vested rights acquired under contract may not be destroyed by subsequent state legislation."

In the case of Hammond vs. Place (1898) 74N.W.1002, 115 Mich 628, the Court opined:

> "A legislative act designed to aid a municipality in avoiding its legal obligations would be inoperative and void as impairing the obligations of contracts."

In two more recent cases, the Michigan Courts have also dealt with Article 1, Section 10 of the Constitution. In the case of Health Care Association Workers Compensation Fund vs. Director of Bureau of Workers Compensation, Department of Consumer and Industry Services (2005) 694 NW2nd 761, 263 Mich.App.236, and Studier vs. Michigan Public School Employees Retirement Board (2004) 679 NW2nd 88, 216, Mich.App.460, affirmed in part and reversed in part 698 NW2nd 350, 472 Mich 642, the court indicated:

"The purpose of the contract clause is to protect bargains reached by parties prohibiting states from enacting laws that interfere with pre-existing contractual arrangements."

Based upon the statutory and constitutional provisions as well as the case law, it is clear to me that the City will be barred and prohibited from implementing the provisions of Act 152 until such time as an award has been rendered and a new contract executed. Otherwise, the State will have clearly implemented the City in a violation of the provisions of Public Act 312 (13), as well as the Constitution of the State of Michigan, Article I, Section 10. There can be no other conclusion but that the obligation of their contract between the City and the Union would be impaired by any imposition of any item that was a mandatory subject of bargaining at the time that the contract was entered into as well as when the parties placed the provisions of the collective bargaining agreement into the Act 312 pipeline.

Allen J. Kovinsky, Panel Chairperson

Dated: November 3, 2011.