

PUBLIC-SECTOR COLLECTIVE BARGAINING

Labor Relations in the Public Eye

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Labor relations in the public eye present unique challenges. The decision makers for public employers are elected officials or appointees, subject to constant oversight by their constituents. As a result, public-sector collective bargaining is subject to an overlay of politics, public opinion, and concern over the proper use of taxpayer funds.

Public-sector labor law basics

Public-sector labor relations are not subject to the federal National Labor Relations Act or many other federal or state labor laws that apply to the private sector. Rather, the public sector is governed by state laws directed specifically at public employers and employees. The Public Employment Relations Act (PERA) is Michigan’s principal state law in this area.

With some exceptions, PERA defines “public employee” as:

an individual holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service....¹

PERA tracks many tenets of private-sector labor laws. It includes the basic requirement to bargain in good faith and prohibits interfering with or retaliation for engaging in activities such as union organizing or exercising rights under a collective bargaining agreement. Public employees do not, however, have the right to strike, which private employees may use as leverage in collective bargaining. This is because Michigan’s legislature determined that

public services like public education and police and fire protection are valued too greatly to be subject to periods of interruption from strikes.² The absence of the right to strike significantly affects the bargaining process.

In 1969, four years after adopting PERA as a result of what was “euphemistically called the ‘blue flu,’”³ the legislature enacted Act 312 of 1969 to provide an “alternate, expeditious, effective and binding procedure” to resolve labor disputes involving police and fire service employees.⁴ To that end, Act 312 requires compulsory, binding arbitration to resolve disputes over new contract terms. Act 312 does not replace the duty to bargain or any other obligation under PERA; it merely adds that an arbitrator will decide the terms of employment if an agreement cannot be reached. Some argue that the bargaining process with municipal police and fire service employees has become more difficult and protracted since Act 312 was adopted.⁵

Michigan’s Employment Relations Commission is responsible for implementing and administering PERA and Act 312. The three-member commission and the Bureau of Employment Relations certify bargaining units⁶ and representatives⁷ for public employees; hold elections to certify representatives;⁸ resolve unfair labor practice charges;⁹ and appoint mediators,¹⁰ arbitrators,¹¹ and fact finders.¹²

Finally, controversial right-to-work legislation,¹³ implemented in 2012, prohibits mandatory union membership as a condition of employment.¹⁴ This creates a challenging dynamic. While a public employee may choose not to join a union or contribute to having a bargaining representative, the bargaining representative must still represent *all* employees in the bargaining unit. Notably, this law does not apply to police and firefighters’ unions.¹⁵ The full effect of the law is not yet clear, since many contracts were in place before the law took effect.



Duty to bargain and overcoming impasse

PERA requires collective bargaining over mandatory subjects such as rates of pay, hours of employment, and other terms and conditions of employment.¹⁶ Surprising some, this duty extends to any two or more individuals who want to discuss mandatory subjects of bargaining—even when no union or bargaining representative is involved.

The duty to bargain is not a requirement to agree. PERA establishes procedures for overcoming an impasse if the parties cannot agree, before a public employer may implement its position, however. If police or fire service employees are involved, compulsory arbitration adds another layer to this obligation—and to the bargaining strategy.

Mediation

PERA authorizes either a bargaining representative or a public employer to request mediation through the Employment Relations Commission for disputes related to new contracts, contract renewals, and grievances.¹⁷ Mediation under PERA is a nonbinding process that is most often invoked when the parties have reached an impasse on an issue. The parties must notify the commission of the status of negotiations at least 60 days before a contract expires.¹⁸ The commission must appoint a mediator if an agreement is not reached within the next 30 days.¹⁹

FAST FACTS

Labor relations in the public sector present challenging dynamics that are often not present in the private sector, in part because of the open and public nature of the process.

The public-sector bargaining process is significantly affected by certain provisions in Michigan law, including the inability of public workers to strike and the existence of compulsory arbitration (Act 312).

Attorneys involved in public-sector bargaining have the unique challenge of vigorously advancing their clients' interests while respecting their concerns about public perception and other political calculations.

In many circumstances, parties resolve a bargaining impasse once the commission-appointed mediator is used. The mediator typically assists the parties in negotiations at no cost.²⁰ He or she does not have a tie to the parties and may bring a different perspective and knowledge of the labor market to the bargaining table. The mediator can be creative in crafting resolutions to overcoming an impasse. If mediation is unsuccessful, the parties generally move to the next step in the bargaining process: fact finding.

Fact finding

One or both of the parties may request fact finding if an impasse exists on even one issue after bargaining and mediation. The Employment Relations Commission, relying on the selections of the parties, will appoint a fact finder from its panel.²¹ The fact finder then conducts a hearing to receive evidence and argument on each party's position on the open issue(s). Post-hearing briefs are usually filed to further explain why a party's position on an issue should be recommended by the fact finder. The fact finder then issues a report and recommendation to settle the unresolved issues.

The report and recommendation is not an edict and is not binding. It is a public document, however, and the parties are free to disseminate it as they see fit. Since public-sector labor relations are, as noted, conducted in the public eye, publicizing the report could have a persuasive effect on the parties.

PERA requires the parties to meet and bargain at least once in the 60 days after the fact finder issues the report and recommendation. Unless Act 312 applies, this is the final mandatory opportunity for the parties to resolve their contract issues. If the parties are unable to resolve their differences at the final mandatory bargaining session or in subsequent voluntary negotiations, the public employer may implement the terms of a contract, as discussed below.

Unilateral implementation

For bargaining units not covered by Act 312, public employers have what may be the ultimate tool to end an impasse: the option to unilaterally impose their position on unresolved issues. Imposed terms are combined with previously agreed upon terms to create the parties' "contract." That contract remains in effect until the bargaining unit makes a material change in its position on an issue that led to the impasse.²²

Both parties should consider the challenges presented by implementing terms of a contract after an impasse. While some public employers may view this as an opportunity to have the last word, there will undoubtedly

be consequences in employee morale or performance and additional labor strife.

Act 312 arbitration

If employees in a bargaining unit are "public police or fire department employees" or "emergency medical service personnel,"²³ the final step in overcoming an impasse is dictated by Act 312 and the Employment Relations Commission's implementing rules.²⁴ Either party can initiate Act 312 proceedings through the commission 30 days after an unresolved issue is submitted for mediation. The parties may agree to select a particular arbitrator from a commission-approved list or the commission will supply a list of arbitrators for the parties' consideration. Each party also selects a delegate (typically an advocate) to join the arbitrator to form a three-member arbitration panel. This panel decides the terms of the parties' contract—usually by a 2–1 vote on each issue.

The arbitrator holds a hearing to receive testimony, exhibits, and argument on each open issue. The record is then evaluated based on 10 standards set forth in Act 312, including "the financial ability of the unit of government to pay"; the "stipulations of the parties"; a "comparison of the wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with [those] of other employees performing similar services"; and the conditions of employment of other employees within the unit of government.²⁵ The act specifically requires that "the arbitration panel shall give the financial ability...to pay the most significance, if the determination is supported by competent, material, and substantial evidence."²⁶

Within 30 days after the hearing, the panel must issue an opinion that includes written findings on each unresolved issue identified in the parties' last offers of settlement. The panel does not have the authority to create its own contract terms and must instead choose one of the parties' positions on each issue. Like baseball arbitration, each issue is decided on a winner-takes-all basis.²⁷ The decision of the panel is final and binding²⁸ and subject to a deferential review in circuit court.²⁹

Unique challenges

Public-sector bargaining includes unique obligations, processes, and challenges. Of significant concern to a public employer is the public's view and the potential for political consequences, both of which can affect the bargaining process. A process that typically occurs behind closed doors for the private-sector employer is conducted publicly in the realm of the Open Meetings Act, the Freedom of Information Act, employees' First Amendment free speech protections, and the inquiring minds of the taxpayers, political opponents, and the like.

In addition, a public body is composed of elected or appointed officials who may not always share the same views or goals—or, perhaps, collective bargaining styles or knowledge. This may lead to second guessing by members of the governing body who are not on the bargaining team. Intentionally or not, members of a governing body may also receive “back-door” contact from bargaining representatives or employees that could undercut a bargaining team’s efforts to settle a contract. Employees or representatives may also appear at public meetings to comment on the bargaining process.

A successful labor representative must recognize all these competing interests and strike a balance between vigorous representation of the public employer’s or employees’ interests and respecting the delicate and open nature of public-sector labor relations. This requires educating public employers and employees on the process, ensuring clear and open communication, and emphasizing the need for a consistent voice and clear authority at the bargaining table. ■



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ENDNOTES

1. MCL 423.201(1)(e).
2. MCL 423.202.
3. See Police Officers Association of Michigan, *Practical Aspects of P.A. 312* <<http://www.poam.net/legislative/practical-aspects-of-p-a-312/>> (accessed August 23, 2015).
4. MCL 423.231 *et seq.*
5. Act 312 was introduced by then State Senator Coleman Young. He later said “it was the worst mistake he ever made in public life.” Bombay & Gallagher, *How Detroit went broke: The answers may surprise you—and don’t blame Coleman Young*, Detroit Free Press (September 15, 2013).
6. MCL 423.213.
7. MCL 423.212.
8. *Id.*
9. MCL 423.216.
10. MCL 423.207(1) and (2).
11. MCL 423.235(1) and (2).
12. Mich Admin Code, R 423.135.
13. 2012 PA 349, amending MCL 423.210.
14. MCL 423.210(3)(b).
15. Legislation was recently introduced to include police and firefighters in the scope of right-to-work, but the authors are not aware of widespread legislative support for this effort. See 2015 HB 4311 and 2015 HB 4312.
16. MCL 423.211.
17. MCL 423.207(1); Mich Admin Code, R 423.121.
18. MCL 423.207(2).
19. *Id.*
20. But see MCL 423.207a(5).
21. Mich Admin Code, R 423.131 *et seq.*
22. See *Detroit Police Officers Ass’n v Detroit*, 391 Mich 44, 54–56; 214 NW2d 803 (1974) (relying on NIRA precedent as persuasive authority for interpreting PERA, Michigan’s Supreme Court stated, “Under the NIRA when good faith bargaining has reached an impasse, the employer may take unilateral action on an issue if that action is consistent with the terms of its final offer to the union.”)
23. MCL 423.232 (an emergency telephone operator may also be covered by Act 312 if he or she is directly employed by a police or fire department).
24. Mich Admin Code, R 423.501 *et seq.*
25. MCL 423.239(1)(a), (c), (d), and (e).
26. MCL 423.239(2).
27. MCL 423.238.
28. MCL 423.240.
29. MCL 423.242; see *Detroit v Detroit Police Officers Ass’n*, 408 Mich 410, 485; 294 NW2d 68 (1980), citing *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974) (“Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding . . .”).