STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

-and-

Case No. C12 L-232
Docket No. 12-001872-MERC

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Schultz and Young, PC, by Gregory T. Schultz, for Respondent

Martha M. Champine, Assistant General Counsel, Police Officers Association of Michigan, for Charging Party

DECISION AND ORDER

On September 26, 2013, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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POLICE OFFICERS ASSOCIATION OF MICHIGAN,
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APPEARANCES:

Schultz and Young, P.C., by Gregory T. Schultz, for Respondent

Frank A. Guido, General Counsel, Police Officers Association of Michigan, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTIONS FOR SUMMARY DISPOSITION

On December 7, 2012, the Police Officers Association of Michigan filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Detroit Public Schools pursuant to §§10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to §16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System.

On January 22, 2013, Respondent filed a motion for summary dismissal of the charges pursuant to Rule 165(2)(d) of the Commission's General Rules, 2002 AACS, R 423.165(2), asserting that the charge fails to state a claim upon which relief can be granted under PERA. On March 5, 2013, Charging Party filed a response in opposition to the motion, and a cross-motion pursuant to Rule 165(2)(e) and (f) asserting that Respondent has failed to state a valid defense to the charge and that there are no material issues in dispute and Charging Party is entitled to judgment as a matter of law. On March 12, 2013, I asked Charging Party, in light of certain assertions made in its motion, to clarify the scope of its charge. Charging Party filed a supplemental motion on March 22, 2013. On July 12, 2013, Respondent filed a supplemental answer to the charge and a motion renewing its request for summary disposition.

Based on facts set forth in the charge and in the pleadings of the parties and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

On or about April 18, 2012, Respondent's emergency manager (EM), Roy Roberts, announced that he was promulgating a collective bargaining agreement for members of Charging Party's bargaining unit pursuant to his authority under the Local Government and School District Accountability Act, (PA 4), MCL 141.1503 *et seq*. In accord with this document, he then altered wages and certain other terms and conditions of employment without Charging Party's agreement. On November 6, 2012, PA 4 was repealed by referendum. The charge alleges that Respondent violated its duty to bargain under PERA when, on or about November 19, 2012, Roberts refused Charging Party's demand that he restore wages and other terms and conditions of employment in effect for Charging Party's members prior to April 18, 2012. It also alleges that Roberts unlawfully refused to bargain with Charging Party after the repeal of PA 4.

Facts:

Charging Party represents a bargaining unit consisting of full-time and regular part-time police officers, campus security police officers, and fingerprint technicians employed by Respondent in its Department of Public Safety.

On March 3, 2009, Governor Rick Snyder appointed an emergency financial manager (EFM) for Respondent under the authorizing statute then in effect, the Local Government Fiscal Responsibility Act (PA 72), MCL 141.1519. PA 72 did not give an EFM the right to modify or terminate existing collective bargaining agreements and did not eliminate the duty of a local government with an EFM to bargain in good faith with the exclusive bargaining representatives of its employees under PERA.

On March 16, 2011, the Michigan legislature enacted PA 4. This statute, which was then signed by Governor Snyder, was given immediate effect by the legislature. Section 15(4) of PA 4 authorized the governor, upon the finding of a financial emergency, to declare a local government in receivership and to appoint an emergency manager (EM). The statute gave EMs certain powers with respect to local governments in receivership. As set out in §19(1)(l) of PA 4, these included the power to "reject, modify or terminate one or more terms of an existing collective bargaining agreement." The statute imposed certain conditions on this power. However, if the EM and state treasurer determined that these conditions were met, and the EM had met and conferred with the labor organization, the statute gave the EM the sole discretion to make the decision to modify or terminate an existing agreement. In addition, §26(3) of PA 4 stated, "Subject to section 30(2), 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." Section 15(1) is the section of PERA which requires a public employer to bargain with the exclusive bargaining representative of its employees.

Public Act 4 repealed PA 72. However, it provided, in §30, that an EFM appointed under PA 72 would continue to act as an EM for the local government under the new law. Section 30 of PA 4 read as follows:

> (1) An emergency financial manager appointed and serving under state law prior to the effective date of this act shall continue under this act as an emergency manager for the local government and shall fulfill his or her duties and responsibilities and exercise all of the powers granted under former 1988 PA 101 or former 1990 PA 72. Except as provided in subsection (2), the provisions of this act shall apply to any local government for which an emergency financial manager is appointed and serving as of the effective date of this act.
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> (2) For a local government for which an emergency financial manager is serving as of the effective date of this act, the provisions of section 26(3) shall not become applicable until 60 days after the effective date of this act.

Charging Party was certified as the exclusive representative for this unit on March 21, 2011, replacing another labor organization. The last collective bargaining agreement between Respondent and this labor organization expired in 2009. However, Respondent had continued to adhere to the terms of this agreement. After Charging Party's certification, and through the beginning of 2012, the parties had multiple meetings in an attempt to reach agreement on wages and other terms and conditions of employment for members of the unit. Respondent characterized these meetings as "meet and confer" sessions rather than bargaining on the grounds that it had no duty to bargain under §15(1) of PERA.

On or about February 1, 2012, according to Charging Party, the parties reached a tentative agreement on the terms of a new collective bargaining agreement, but Respondent almost immediately reneged. According to Respondent, the parties reached a good faith bargaining impasse when, on or about March 8, 2012, Charging Party announced that it could not agree to significant terms of the proposed agreement. For reasons discussed below, I find that whether the parties had reached a bargaining "impasse," as that term is used by the Commission, is irrelevant here.

On April 19, 2012, Roberts issued an order entitled "Imposing the Initial Collective Bargaining Agreement between the School District of the City of Detroit and the Police Officers Association of Michigan Pursuant to the Local Government and School District Fiscal Accountability Act." Accompanying that order was a document entitled "Collective Bargaining Agreement under the Local Government and School District Fiscal Accountability Act between the School District of the City of Detroit and Police Officers Association of Michigan." The document consisted of thirty-nine articles, including articles entitled recognition, management rights and responsibilities, and a grievance procedure. It stated that the duration of the agreement was from April 18, 2012 through June 30, 2014. However, the agreement reiterated the statement in PA 4 that the EM had the right to reject, modify, or terminate the collective bargaining agreement. Roberts' April 19 order also stated that the order could be amended, modified, repealed or terminated by any subsequent order issued by the EM.

Charging Party asserts, and Respondent does not dispute, that the document labeled a collective bargaining agreement issued by Roberts on April 18, 2012 varied substantively from the

collective bargaining agreement between Respondent and Charging Party's predecessor, and that after April 18, 2012, Roberts altered existing wages and certain other terms and conditions of employment for unit members.

During the summer of 2012, a petition for referendum of PA 4 was filed with the Michigan Secretary of State and presented to the Board of Canvassers for review pursuant to Article 2, §9 of the Michigan Constitution and the Michigan Election Law, MCL 168.1 et seq. On August 8, 2012, the Board of Canvassers certified the referendum for placement on the ballot for the November 6, 2012 election. Pursuant to MCL 168.477(2), PA 4 ceased to be effective on August 8. On November 6, 2012, PA 4 was repealed by referendum. The Michigan Court of Appeals subsequently held that the repeal by referendum of PA 4 invalidated the legislature's repeal of PA 72 and PA 72 was, therefore, revived. *Davis v Roberts*, unpublished order of the Court of Appeals, issued November 16, 2012 (Docket No. 313297).

On November 7, 2012, Charging Party sent a letter to Respondent's chief labor relations officer. The letter, quoted below in its entirety, read:

> Due to the November 6, 2012 repeal of PA 4 of 2011, we hereby demand that the status quo ante of wages, hours, [and] terms and conditions of employment in effect prior to the unilateral action of the emergency manager imposing wages, hours [and] terms and conditions of employment effective April 18, 2012 be restored.
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> Your failure to do so will result in the filing of an unfair labor practice charge.

Charging Party received the following response from Roberts dated November 19, 2012:

> I am in receipt of your letter dated November 7, 2012 demanding that the "status quo ante" of wages, hours [and] terms and conditions of employment in effect prior to April 18, 2012 be restored. It is clear that those actions taken by me in accordance with Public Act 4 as an Emergency Manager remain valid and in effect.

Although I gave it the opportunity to do so, Charging Party did not assert in its charge or pleadings that any other communication between it and Roberts took place on the subject of Respondent's bargaining duty after the above exchange of letters.

In December 2012, the legislature passed the Financial Stability and Choice Act, MCL 141.1541 *et seq*, (PA 436). This statute, which became effective on March 28, 2013, contains provisions essentially identical to §§19(1) and 26(3) of PA 4.

Discussion and Conclusions of Law:

Charging Party's first allegation is that Respondent violated PERA by refusing, after PA 4 was repealed by referendum, to rescind the changes in terms and conditions of employment announced and implemented by Roberts in April 2012. On January 29, 2013, I issued a decision and recommended order which addressed a similar issue, *City of Detroit*, Case No. C12 F-125/12-00591-MERC. In July 2012, the City of Detroit was operating under a consent agreement instituted under

PA which suspended its duty to bargain under §15(1) of PERA when it implemented unilateral changes in the terms and conditions of employment of the charging party's members. The charging party in that case, the same labor organization that filed the instant charge, alleged that the City violated PERA by refusing charging party's demand that it rescind these changes after PA 4 was suspended. I concluded that it did not. This case is currently on exceptions before the Commission.

In the instant case, Respondent argues that the Commission has no jurisdiction to grant the relief Charging Party seeks, which is the rescission of these changes, because the Commission lacks jurisdiction to determine whether actions taken pursuant to PA 4 remain valid after that statute's repeal by referendum. I agree that this dispute involves questions that are not solely within the Commission's exclusive jurisdiction. However, whether Respondent violated PERA by the acts alleged to constitute the unfair labor practices is a matter to be decided by the Commission. I find that the Commission should defer to any controlling court ruling on the effect of PA 4's repeal on actions taken validly by an EM while that statute was in effect.1 In the absence of any controlling court precedent on the effect of PA 4's repeal, however, I conclude that the Commission can and must decide whether PERA was violated.

In both the instant case and in *City of Detroit*, Charging Party argues that unilateral changes instituted under PA 4 must be rescinded because, according to Charging Party, the general rule in Michigan is that when a statute is repealed without a savings clause, it must be considered as if it has never existed. For this proposition, Charging Party cites *Baiger v Zewardzki*, 252 Mich 14 (1930) and *Detroit Trust Co v Allinge*r, 271 Mich 600 (1935). As I pointed out in my decision in *City of Detroit*, however, these cases involved statutes repealed by subsequent legislative action. PA 4 was not repealed by legislative enactment; it was repealed by referendum of the voters pursuant to Article 2, §9 of the Michigan Constitution. In my view, this difference is significant because a savings clause cannot be inserted into a referendum. Therefore, neither the voters nor the legislature can expressly "save" rights conferred by the statute repealed by referendum. In this case, as in *City of Detroit*, Charging Party has not cited to me any case holding that repeal of a statute by referendum invalidates actions lawfully undertaken while that statute was in effect. If and when a court of competent jurisdiction decides this issue as a question of state law, the Commission should defer to the court's decision. However, I conclude that in the absence of any such decision, whether Respondent in this case violated PERA by refusing to rescind the April 2012 changes should be decided as a PERA question.

In April 2012, Respondent had an EM and had been placed in "receivership" within the meaning of the term in PA 4. Under §26(3) of PA 4, therefore, Respondent had no duty to bargain under PERA. Like the City of Detroit in July 2012, Respondent had no obligation to refrain from unilateral action at the time Roberts changed terms and conditions of employment for members of Charging Party's bargaining unit and Roberts' actions, at the time they were taken, were lawful. As I stated in my *City of Detroit* decision, as far as I am aware, there has never been either federal or state

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1 This issue may be decided by a federal court. In *City of Pontiac Retired Employees Ass'n v Schimmel*, Docket No. 12-2087, issued August 9, 2013, the United States Court of Appeals for the Sixth Circuit remanded to allow the District Court to consider whether the voters' referendum on PA 4 voided actions taken by the EM in Pontiac pursuant to that Act. That matter remains pending.

legislation temporarily suspending an employer's duty to bargain under either PERA or the National Labor Relations Act (NLRA) 29 US 150 et seq, not to mention repeal of such legislation. Therefore, case precedent under these statutes provides little direct guidance in answering the questions presented by this case or *City of Detroit*. However, under both statutes, an employer whose employees were previously unrepresented is generally required to maintain in effect terms and conditions of employment as they existed at the time the union was certified until the employer and union reach agreement or good faith impasse on new terms and conditions. That is, an employer is not required to reinstate benefits that the employees once enjoyed but were eliminated before the union came on the scene. Here, the passage of PA 4 had the effect of suspending Respondent's duty to bargain. When PA 4 was suspended and then repealed, Respondent reacquired the obligations imposed by §15(1) of PERA.2 However, I conclude, these obligations did not require it to rescind the changes it lawfully made to employees' terms and conditions at a time when it had no duty to bargain.

For the reasons discussed above, and as stated in my *City of Detroit* decision, I find that Respondent had no duty to rescind these changes after the voters rejected PA 4 on November 6, 2012. I conclude, therefore, that Respondent did not violate §10(1)(e) of PERA refusing to rescind the changes when Charging Party demanded that it do so on November 7, 2012.

I also note that because of PA 436, Respondent's duty to bargain has once again been suspended. If the Commission were to order Roberts' successor to rescind the changes Roberts implemented pursuant to PA 4, he could, at least arguably, simply reinstate them.

Charging Party's second allegation is that Respondent unlawfully refused to bargain with Charging Party after PA 4's repeal. It was with respect to this allegation that I asked Charging Party to clarify its charge after it filed its motion for summary disposition, since I concluded that it was unclear from the charge and statements made in Charging Party's motion whether Charging Party was alleging that Roberts refused to return to the bargaining table after PA 4 was repealed. As Charging Party's supplemental motion makes clear, Charging Party's position is that its November 7, 2012 letter to Respondent's chief labor relations officer constituted a demand that Roberts return to the table. Respondent disagrees. I agree with Respondent. The letter only demands that Roberts restore the status quo with respect to terms and conditions of employment as it existed prior to April 18, 2012. It does not demand, or suggest, that the parties resume, or begin, negotiations for a collective bargaining agreement. An employer's duty to bargain is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City*, 135 Mich App 553, 558 (1984). Since Charging Party's November 7 letter did not request Respondent to do anything other than rescind the changes Roberts made on and after April 18, I conclude that the second allegation should also be dismissed.

Finally, I note that Respondent argues in its motion that even if Charging Party had made a demand to bargain in November 2012, it would have had no duty to bargain under PERA over terms and conditions of employment covered by the "collective bargaining agreement" promulgated by

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2 I note that Respondent apparently does not concede this point. However, it is not essential for my analysis since, if Respondent had no obligations under §15(1) in November 2012, its actions could not have violated those obligations.

Roberts in April 2012 and allegedly extending through June 2014. Whether §19(1) of PA 4 gave an EM the authority to create a new "collective bargaining agreement," in addition to modifying or terminating an agreement in existence at the time the local government entered receivership, is a question which may arise again since PA 436 contains language similar to §19(1). However, since I have concluded that Respondent had no duty to return to the bargaining table because Charging Party did not request that it do so, this is an issue that I need not decide in this case.

Based on the discussion and my conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 26, 2013