STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C12 I-178
Docket No. 12-001591-MERC

-and-

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

APPEARANCES:

City of Detroit Law Department, by Letitia Jones, for Respondent

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

DECISION AND ORDER

On January 29, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter finding that the Charge against Respondent, City of Detroit, did not state a claim upon which relief can be granted under the Public Employment Relations Act (PERA) 1965 PA 379, as amended, MCL 423.201 – 423.217. On or about July 14, 2012, Respondent unilaterally made changes to terms and conditions of employment for members of the bargaining unit represented by Charging Party, Police Officers Association of Michigan. The changes were made pursuant to the terms of a consent agreement entered into with the State of Michigan in accordance with the provisions of the Local Government and School District Fiscal Accountability Act, 2011 PA 4. On August 8, 2012, 2011 PA 4 was suspended when a voter referendum on that Act was placed on the ballot for the November 6, 2012 election. The ALJ found that Respondent had not violated §10(1)(e) of PERA by refusing, after August 8, 2012, to rescind the changes in terms and conditions of employment that it had imposed pursuant to the terms of the consent agreement. On this basis, the ALJ recommended that the Commission dismiss the unfair labor practice charge in its entirety. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On February 20, 2013, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On February 22, 2013, Respondent filed a response to Charging Party's exceptions to the ALJ's Decision and Recommended Order. Subsequently, Respondent filed a petition for bankruptcy protection.

Further action in this matter was stayed pursuant to the July 25, 2013 order of the United States Bankruptcy Court in Respondent's bankruptcy.

On June 30, 2015, the Commission received a letter from Charging Party indicating that the issues underlying the charge have been resolved and requesting leave to withdraw its exceptions. Charging Party's request is hereby approved and Charging Party's exceptions are dismissed. Inasmuch as there are no longer exceptions to the ALJ's Decision and Recommended Order, said Order is adopted by the Commission.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 28, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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POLICE OFFICERS ASSOCIATION OF MICHIGAN,
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APPEARANCES:

Letitia Jones, City of Detroit Law Department, 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 September 12, 2012, the Police Officers Association of Michigan filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Detroit 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 November 15, 2012, Respondent filed a motion for summary dismissal of the charges pursuant to Rules 165(2) (d) and (f) of the Commission's General Rules, 2002 AACS, R 423.165 (2). On November 20, 2012, Charging Party filed an answer in opposition to the motion to dismiss and motion for partial summary disposition pursuant Rule 165(2)(f). Oral argument was held on these motions on December 10, 2012. At the conclusion of the oral argument, I informed the parties that while I was not issuing a bench decision, I intended to recommend to the Commission in a written opinion that it dismiss the charge on Respondent's motion. Based on facts not in dispute, and on the arguments made by the parties in their pleadings and during oral argument, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of emergency medical service personnel and other employees of Respondent. The charge filed on September 12, 2012 alleges that Respondent violated its duty to bargain under §15 of PERA by refusing, after August 8, 2012, to rescind changes in terms and conditions of employment that were imposed unilaterally on its unit by Respondent on or about July 14, 2012. At the time these changes were imposed, Respondent's duty to bargain with Charging Party was suspended pursuant to the terms of a consent agreement entered into with the State of Michigan and in accord with the provisions of the Local Government and School District Fiscal Accountability Act, 2011 PA 4, MCL 141.1503 et seq. On August 8, 2012, 2011 PA 4 was itself suspended when a voter referendum on this law was placed on the ballot for the November 6, 2012 election by the Michigan Board of State Canvassers. 2011 PA 4 was repealed by referendum when the voters failed to approve the law in the November election.[1]

Facts:

The parties agree on the relevant facts. Charging Party was certified as the bargaining agent for the above unit of Respondent's employees on June 1, 2009. Charging Party replaced the International Union of Operating Engineers, Local 547, whose contract with Respondent expired in 2009. Thereafter, Charging Party and Respondent engaged in sporadic efforts to negotiate a new agreement. On or about June 11, 2010, Charging Party filed a petition with the Commission for compulsory arbitration of the dispute over the contract terms pursuant to 1969 PA Act 312 (Act 312), MCL 423. 231 et seq. The petition was held in abeyance at the parties' mutual request.

Sections 13 and 14 of Act 312, MCL 423.243 and 423.244, read as follows.

> Sec. 13. 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.
>
> Sec. 14. This act shall be deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and does not amend or repeal any of its provisions; but any provisions thereof requiring fact-finding procedures shall be inapplicable to disputes subject to arbitration under this act.

2011 PA 4 took effect on March 16, 2011. One of the options for a financially troubled local government under this Act was the execution of a consent agreement with the State of Michigan. Section 14a (10) of 2011 PA 4 provided:

[1] The charge as originally filed also alleged that Respondent violated its duty to bargain in good faith by refusing, on and after July 14, 2012, to participate further in a pending proceeding for compulsory arbitration under 1969 PA 312 (Act 312), MCL 423.231 et seq, and by implementing unilateral changes in work rules on or about August 12, 2012. Both these allegations were withdrawn by Charging Party during the oral argument.

> Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this act, that local government is not subject to section 15(1) of 1947 PA 336, MCL 423. 215, for the remaining term of the consent agreement.[2]

A previous statute,1990 PA 72, MCL 141.1201 et seq, also gave financially troubled local governments the option of entering into a consent agreement with the State, but did not suspend the local government's duty to bargain during the terms of the consent agreement. 2011 PA 4 explicitly repealed 1990 PA 72.

In addition, effective March 16, 2011, PERA was amended to add the following as §15(9):

> A unit of local government that enters into a consent agreement under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, is not subject to subsection (1) for the term of the consent agreement, as provided in the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531.

Sometime around April 4, 2012, Respondent entered into a consent agreement with the State as provided by 2011 PA 4. This agreement was titled Financial Stability Agreement (FSA). Section 4.4 of the FSA stated that the State Treasurer had determined that Respondent's duty to bargain with its unions under §15(1) of PERA would be suspended effective May 10, 2012. On June 12, 2012, Respondent sent Charging Party a letter notifying it of the suspension and clarifying how Respondent intended to proceed with respect to certain matters during the period that it had no legal duty to bargain under PERA. The letter included the following paragraphs:

> The City will be presenting changes to be made to the terms of the expiring collective bargaining agreements to comply with the FSA. The City will consider any input from union representatives regarding the proposed changes and compliance with the requirements of the FSA.
>
> Please be advised, however, that the City's position is that under Public Act 4, changes in wages, hours, and terms and conditions of employment do not have to be negotiated to legal impasse before necessary changes are made, nor does the City have any legal obligation to participate in bargaining, mediation, fact-finding, or Act 312 proceedings.

[2] Section 15(1) of PERA states: A public employer shall bargain collectively with the representatives of its employees . ...

Around the end of June 2012, Respondent presented Charging Party with a draft of what Respondent referred to as the "City Employment Terms" (CET) for members of Charging Party's bargaining unit. On or about July 12, 2012 a final draft CET was presented to and approved by Respondent's financial advisory board (FAB), a body created pursuant to the FSA. On or about July 14, 2012, Respondent provided Charging Party with a copy of the final draft. The CET went into effect sometime around July 18, 2012, although not all of the changes set out in that document were implemented immediately.

The CET was in the form of a collective bargaining agreement. However, there is no dispute that the CET did not represent the agreement of the parties. There is also no dispute that the CET materially altered wages and other terms and conditions of employment for members of Charging Party's unit.

On or about July 2, 2012, Charging Party notified Respondent that it wished to proceed with the Act 312 arbitration. On July 11, 2012, Respondent informed Charging Party that its position was that the suspension of its duty to bargain with Charging Party meant that it had no ob ligation to participate in Act 312 arbitration proceedings. In its letter, Respondent cited a July 9, 2012 order by Ingham County Circuit Court Judge Paula Manderfield denying the request of the Detroit Police Officers Association for a preliminary injunction requiring Respondent to participate in an Act 312 arbitration with that labor organization and to maintain the status quo as to terms and conditions of employment for employees represented by that labor organization during the Act 312 proceeding.

During the summer of 2012, a petition for referendum of 2011 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.

Article 2 § 9 of the Michigan Constitution of 1963 states:

> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

MCL 168.477(2), which implements this provision, states:

> For the purposes of the second paragraph of section 9 of article 2 of the state constitution of 1963, a law that is the subject of the referendum continues to be effective until the referendum is properly invoked, which occurs when the board of state canvassers makes its official declaration of the sufficiency of the referendum petition.

In accord with this statute, 2011 PA 4 ceased to be effective on August 8, 2012. On August 9, 2012, Charging Party sent Respondent the following letter:

> As a result of the recent Supreme Court decision, the provisions of Public Act 4 of 2011 are no longer in effect. The Financial Stability agreement entered into by the City of Detroit, pursuant to PA 4 of 2011, is likely rendered null and void, but, at a minimum, is certainly not in effect.
>
> The City of Detroit and the Detroit EMS Bargaining Unit, as represented by POAM, must now operate under restored wages, hours, terms and conditions of employment as they existed prior to execution and implementation of the Financial Stability agreement. As you will recall, the parties were operating under the wages, hours, terms and conditions of employment of the 2009 expired collective bargaining agreement. In addition, POAM filed for compulsory arbitration pursuant to PA 312 of 1969, as amended, which remains in effect at this time. Pursuant to Section 13 of PA 312, all wages, hours, terms and conditions of employment must be maintained during the pendency of the proceeding, which is also consistent with the mandate of law regarding treatment of mandatory subjects after expiration of a collective bargaining agreement.
>
> In the event the pre-existing wages, hours, terms and conditions of employment are not restored to the *status quo ante* forthwith, the appropriate Unfair Labor Practice Charge will be filed against the City of Detroit.

Respondent did not agree to restore wages or other terms and conditions of employment as they existed prior to the implementation of the CET, and the instant charge was filed on September 12, 2012. Sometime between the filing of the charge and October 1, 2012, the Commission, at Charging Party's request and over Respondent's objection, decided that the Act 312 proceeding should go forward. As noted above, Michigan voters failed to approve 2011 PA 4 in the election held on November 6, 2012, and the act was repealed by referendum. The Court of Appeals held that as a result of the November election, no part of 2011 PA 4, including the portion repealing 1990 PA 72, remained in effect. Accordingly, 1990 PA 72 remained in effect. *Davis v Roberts*, unpublished order of the Court of Appeals, issued November 16, 2012 (Docket No. 313297).

<u>Discussion and Conclusions of Law</u>:

Respondent's principal argument is that the charge should be dismissed because Respondent had no duty to bargain with Charging Party over the terms of the CET before it imposed them since Respondent's duty to bargain was suspended under 2011 PA 4. Only at the very end of its brief does Respondent acknowledge that 2011 PA 4 was repealed by referendum. In the last paragraph of its brief, Respondent states that Charging Party "might" argue that, as a

result of this repeal, the terms and conditions of employment for Charging Party's members should revert to those in effect prior to the CET. Respondent asserts that this argument is without merit because the "circumstances alleged in the charge" occurred while 2011 PA 4 was legally in effect. In this paragraph, Respondent also acknowledges that, at least by the time its motion was filed, Respondent once again had a duty to bargain with Charging Party under §15(1) of PERA. According to Respondent, however, "the status quo for continued negotiations" should be the terms of the CET.

Charging Party acknowledges, at least for the purposes of this charge, that Respondent was authorized by 2011 PA 4 to implement changes in its unit members' terms and conditions of employment in July 2012. However, it alleges that Respondent violated PERA by refusing, after 2011 PA 4 was suspended on August 8, 2012, to rescind the changes it implemented in July 2012. That is, the alleged unfair labor practice is not the implementation of those changes but Respondent's refusal, after August 9, 2012, to accede to Charging Party's demand that Respondent restore the status quo as it existed prior to the CET.

Charging Party argues, first, that the changes implemented by Respondent in July 2012 were a "fictional" or "bogus" status quo since they were not the result of collective bargaining pursuant to PERA. Charging Party offers no case support for its argument that Respondent was required to rescind the changes it implemented in July 2012 after PA 4 was repealed because the changes it implemented were not the result of collective bargaining. As far as I am aware, there has never been either federal or state 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, the case precedent under these statutes provides little guidance in answering the questions presented by this case. However, I note that an employer's duty to maintain the status quo while negotiating a collective bargaining agreement until the parties have reached impasse is not limited to wages, hours and terms and conditions of employment established as a result of collective bargaining with the current union or its predecessor. In fact, the seminal US Supreme Court case holding that an employer is prohibited during contract negotiations from unilaterally changing terms and conditions of employment, *NLRB v Katz*, 369 US 736 (1962), involved parties negotiating a first contract. The unilateral changes the Court found unlawful in that case were, in part, changes to terms and conditions of employment established initially by the employer unilaterally prior to the union's certification. The Court held that the unilateral changes made by the employer while negotiations were ongoing were tantamount to an outright refusal to negotiate over these subjects. It is well established that, with some limited exceptions, an employer negotiating a first contract must maintain the status quo as it existed at the time of the union's election and certification, including all past practices that had become terms and conditions of employment, until the parties reach a good faith impasse. See, e.g., *First Student Inc,* 359 NLRB No. 12 (2012). Of course, the obligation to bargain with the exclusive bargaining representative of its employees does not require an employer to reinstate benefits that its employees might once have enjoyed but that were eliminated before the union came on the scene. By analogy, an employer whose duty to bargain has been restored after being legally suspended should have the duty to maintain wages, hours and terms and conditions of employment as they existed at the time its duty to bargain was restored, but no obligation to restore wages or benefits to their prior levels or amounts. Under

this analogy, Respondent had the duty to maintain the status quo as it existed on August 8, 2012, when 2011 PA was suspended, but no duty to restore the pre-CET status quo.

Charging Party also argues that the repeal of 2011 PA 4 invalidates Respondent's continuing reliance on that statute as the justification for its actions. According to Charging Party, the general rule in Michigan is that when a statue 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). However, although different rules apply to criminal statutes, the courts have also held that repeal of a statute, even without a savings clause in the repealing statute, does not impair or otherwise affect rights that have become vested or accrued while the statute was in force. *Minty v. State of Michigan*, 336 Mich 370, 390 (1953); *Hurt v Michael's Food Center,* 249 Mich App 687, 692 (2002).

Moreover, 2011 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. 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 that circumstance, MCL 168.477(2) clearly and unambiguously states that a law that is subject to a referendum remains in effect until the Board of Canvassers makes a declaration of the sufficiency of the petition. In the instant case, therefore, as Charging Party appears to concede, Respondent's implementation of the CET in July 2012 was lawful because it was authorized by 2011 PA 4 which was in effect at that time. Since Charging Party has not cited to me any case holding that repeal by referendum invalidates actions lawfully undertaken while the statute was in effect, I conclude that Respondent's implementation of the terms of the CET was not retroactively invalidated by 2011 PA 4's repeal by referendum. Given that conclusion, I see no reason to conclude that Respondent's obligation to bargain with Charging Party under §15(1) of PERA after August 8, 2012 required it to rescind the changes it made to terms and conditions of employment while 2011 PA 4 was still in effect.

Charging Party argues, in addition, that the "true" status quo between the parties as to wages, hours, and terms and conditions of employment were those in effect on June 11, 2010, when Charging Party filed its Act 312 petition. Charging Party bases this argument on §13 of Act 312, which prohibits either party from changing terms and conditions of employment during the pendency of the petition without the consent of the other. The Commission has repeatedly held that it does not have jurisdiction to enforce §13 of Act 312. See *City of Jackson*, 1977 MERC Lab Op 402; *City of Flint*, 1993 MERC Lab Op 181. In *City of Kalamazoo and Kalamazoo Co Sheriff,* 24 MPER 17 (2011), the Commission clarified and partially overruled these decisions. In *Kalamazoo,* the Commission held that while it does not have jurisdiction to enforce §13 of Act 312, the existence of §13 does not deprive the Commission of jurisdiction to remedy a violation of an employer's duty to bargain based on a unilateral change made while an Act 312 petition is pending but before the parties reached a good faith bargaining impasse. The Commission emphasized that §13 of Act 312 does not supplant the duty to bargain in good faith as defined in PERA. Rather, it supplements the parties' obligations under that statute by

prohibiting unilateral changes during the pendency of an Act 312 petition even if the parties have reached a good faith bargaining impasse.

The fact that Act 312 is supplementary to PERA is also stated explicitly in §14 of Act 312. Under Act 312, an arbitration panel resolves disputes over the terms of a new collective bargaining agreement when a union representing employees covered by the statute and the employer of these employees have been unable to reach agreement. However, a public employer's obligation to bargain a collective bargaining agreement arises from PERA, not from Act 312. It would be nonsensical, in my view, to conclude that Respondent was prohibited by §13 of Act 312 from unilaterally altering wages, hours, or terms and conditions of employment at a time when its duty to bargain had been suspended by legislative action. However, because the Commission does not have jurisdiction to enforce §13 of Act 312, it is neither necessary nor appropriate for me to decide whether Respondent violated §13 of Act 312 when it implemented the CET in July 2012. It is the role of an arbitrator or a court to determine whether Respondent's implementation of the CET violated that statute. My role, and the role of the Commission, is to determine whether Respondent violated §10(1)(e) of PERA. I am not persuaded that Respondent was required to rescind the changes it unilaterally implemented in July 2012 in order to fulfill its renewed obligation under PERA to bargain in good faith with Charging Party over the terms of a contract. I conclude, therefore, that Respondent did not violate §10(1)(e) by refusing to rescind these changes.

Based on the facts and conclusions of law as set out above, I recommend that the Commission grant Respondent's motion for summary disposition, deny the motion filed by Charging Party, and 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: January 29, 2013