MPELRA
Michigan Public Employer
Labor Relations Association

FOUNDATIONS OF MICHIGAN PUBLIC EMPLOYEE LABOR RELATIONS

MPELRA Training Program
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Morning Session

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Who's In Charge?

- Public sector labor-management relations are governed by the Michigan Employment Relations Commissions (MERC).
- MERC is vested with the authority to protect the rights of employees to organize and to determine whether to have a labor organization as their bargaining representative.
- MERC is also responsible for preventing and remedying unfair labor practices committed by employers and unions.

What is PERA?

PUBLIC EMPLOYMENT RELATIONS
Act 336 of 1947

AN ACT to prohibit strikes by certain public employees;

- to provide review from disciplinary action with respect thereto;
- to provide for the mediation of grievances and the holding of elections;
- to declare and protect the rights and privileges of public employees;
- to require certain provisions in collective bargaining agreements;
- to prescribe means of enforcement and penalties for the violation of the provisions of this act; and,
- to make appropriations.

What About the NLRA?

NATIONAL LABOR RELATIONS ACT
29 U.S.C. §§ 151-169

- In 1935, Congress passed the National Labor Relations Act ("NLRA") making it the policy of the United States to encourage collective bargaining by protecting workers' full freedom of association.
- The NLRA provides employees at private-sector workplaces their fundamental right to seek better working conditions and designation of representation without fear of retaliation.
- Although covering private sector employers and their employees, the NLRA The NLRA *does not apply to federal, state, or local governments*, and therefore does not cover their government employees.

Other Roads Travelled
(When You Come to a Fork)

- The Federal Mediation and Conciliation Service (FMCS), founded in 1947, is an independent agency of the United States Government that offers mediation and arbitration services to the private, public, and federal sectors.
- The American Arbitration Association was founded in 1926 following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes.
- JAMS, and NAM both offer non-government mediator and arbitration services; retired judges, local service providers, etc.

Michigan Has Historically Recognized Mediation as a Public Sector Labor Relations Tool

EMPLOYMENT RELATIONS COMMISSION (EXCERPT)
Act 176 of 1939
423.1 Declaration of public policy.

It is hereby declared as the public policy of this state that the best interests of the people of the state are served by protecting their right to work in a manner consistent with section 14(b) of the national labor relations act, 29 USC 164(b), and preventing or promptly settling labor disputes;

that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and that

the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state.

What Is ~~Meditation~~ Mediation?
(Local Shuttle Diplomacy)

- Mediation is an informal dispute resolution process that is confidential and non-binding, unless a voluntary resolution is reached.
- MERC's Mediation Division offers mediation services to Union and Management representatives at no cost.
- The process uses a trained State Mediator to assist the parties (and grievant in a grievance) in exploring possible resolution of a dispute involving an alleged contract or workplace violation or CBA negotiations.
- If a resolution is not reached, the parties proceed to the next step as if Mediation did not occur.

Watch Your Step!

- While parties can resume negotiations at any time, when they don't -
- In a grievance, Arbitration follows.
- In Collective Bargaining Agreement negotiations:

  Under PERA the next step is Fact-Finding;

  Under Act 312, the next and almost always final step is Arbitration.

Fact-Finding Basics
(In the Neutral Zone)

- At the request of either party, MERC will appoint a neutral Fact Finder.
- The Fact Finder will then contact the parties to discuss scope of matters at issue and schedule a Hearing.
- At the Hearing, the parties present their positions to 'educate' the Fact Finder on them.
- In Fact-Finding the parties are expected to provide all that they have supporting their position and why the opposing position is flawed.

Fact-Finding Basics
(Come One, Come All)

- Fact-Finding Hearings are open to the public.
- Having some union rank and file and/or management not previously involved attend can often lead to internal discussions in the opposing camps that may aid in bringing the parties to an agreement.
- Following the Hearing, after any 'post-hearing' briefs are reviewed, the Fact Finder issues their Report and Recommendations.

The Fact Finder's Report

(Is Solomon in the House?)

- A well written Fact-Finding Report should fully 'cover the ground' of the issues in dispute from both perspectives.
- The Report should offer a recommended resolution of the matters in dispute with reasoning for each recommendation.
- The value of a Fact-Finding report is that it presents a public document written by a neutral that can be read by anyone.

The Less Travelled Road to Impasse

- Although non-binding, as a public document, a Fact-Finding Report can be a persuasive tool that encourages settlement instead of what otherwise comes next.
- Under PERA, following Fact Finding there is one last chance to negotiate.
- If that 'last' negotiating session fails to bring about an agreement, management may declare an *"Impasse".*
- In a true Impasse, management is allowed to impose its last offer as the Collective Bargaining Agreement.

What is an Impasse?

- The National Labor Relations Board describes Impasse as, *"A genuine impasse in negotiations is synonymous with a deadlock: The parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective positions."*
- Michigan case law has defined Impasse as: *"The point at which the positions of the parties have become so entrenched on mandatory subjects that additional bargaining would be unproductive."*
- As a practical matter, impasse occurs when neither party is willing to compromise.

Is Declaring an Impasse a Good Idea?

- When Management declares an Impasse, since the private sector right to strike is not available, aside from the affected Union members' morale dropping into a chasm, Management can expect:
- The Union applying as much pressure as legally possible, including a MERC Unfair Labor Practice claim that Management has imposed or plans to impose new conditions that breach Management's duty of 'good faith' bargaining; and,
- Media campaigns of all sorts, including a cry for the recall of elected officials supporting Management's Negotiating Team.

Rebutting an Impasse ULP

(You Have to Have Faith)

To rebut a claim of breach of 'good faith', Management should be able to show by overwhelming evidence that it has bargained in good faith throughout the process to no avail.

In doing so – 'good faith' may be evidenced by:

1. The number and quality of negotiations;
2. The amount of time spent at the bargaining table;
3. Management's meaningful offer to and/or participation in Mediation;
4. Management's 'decision makers' being at the negotiating table;
5. The willingness of Management to grant some significant Union demands;
6. If applicable, the Union's unreasonable refusal(s) to meet, negotiate in good faith, mediate, compromise, or consistently demand clearly unreasonable terms.

Act 312

(A Senator's Cheer)

- Sponsored by State Senator Coleman A. Young, Act 312 was to bring police and firefighters collective bargaining into compulsory and binding arbitration, among other things, barring union members' from striking.
- Enacted in 1969, one goal of Act 312 was to provide binding arbitration awards which approximate agreements that would have been reached in the normal course of collective bargaining.
- Originally intended to be a temporary 'fix', scheduled to expire in 1972, the Act was extended to 1975, and then was made permanent.

Act 312
(A Mayor's Jeer)

- Senator Coleman A. Young took office as Mayor of Detroit in 1974.
- By 1975, while the Legislature debated and then made permanent Act 312, pointing to consistent gains by labor in 312 arbitrations he called the law he was credited with as, *"…diabolical…"* and, *"…one of my worst mistakes."*
- Mayor Young was renown for his rhetoric, and apparently someone was listening.
- Since then, municipalities have reportedly prevailed in nearly 60 percent of the Act 312 issues heard.

Act 312
(Its for Some, But Not Everyone)

- Emergency medical service personnel are Act 312 eligible if employed by a public police or fire department.
- Emergency telephone operators are Act 312 eligible *"…if … employed by a public police or fire department."*
- Under Act 312 the 3-member Arbitration Panel (a neutral and one interested member for each party) must award one of the two last best offers on each economic issue heard by a majority vote.
- The Panel is free to impose any award it deems appropriate on Non-Economic issues in dispute.

Act 312

(Nothing is as Simple as It Seems)

- In 2012, the first change to Act 312's operating mechanism occurred.
- One prominent change was to shorten the time allowed for Arbitration from start to finish (with exceptions).
- Historically, last best offers were made at the end of the hearing.
- Since 2012, parties exchange last best offers at the beginning of the hearing, and then must build the case for and against those LBO's.

Act 312 – Just What is 'Comparable'

(adj. *'of equivalent quality; worthy of comparison')*

- Using other municipalities pay and benefits present challenges in finding the elements of what is a comparable ability to pay.
- The 2011 amendment added a new Section 9(2), *"The arbitration panel shall give the financial ability of the unit of government to pay the most significance, if the determination is supported by competent, material, and substantial evidence."*
- That leaves to the discretion of the Panel a review of whatever time span it decides appropriate to decide *"ability to pay".*

Act 312
(Keeping Up With The Jones')

- When looking at external comparable communities it opens a wide panorama in which to view *"ability to pay"*.
- Internal and External Comparable pay and benefits are almost always a matter of contention.
- Complications comparing internal non-public safety employee pay and benefits – Funding Sources, etc.
- Different unions for various ranks and the *"me too"* expectation.

What's This Act 345 About?

- The Fire Fighters and Police Officers Retirement Act (Act 345 of 1937) allows for a retirement plan for police officers and firefighters authorizing a funding source.
- Once such a fund is approved by a majority of voters in a municipality or county, Act 345 authorizes the creation of an Act 345 millage and thus a new funding source to fund police and firefighter pensions.
- An Act 345 millage has no ceiling and is not restricted by Headlee.
- Even if a municipality is taxing at the maximum millage permissible, it can levy a millage specifically for an Act 345 pension system fund.
- In theory, this ability frees up some revenue in the general fund to go toward other public services.

What About Civil Service?

FIREMEN AND POLICEMEN CIVIL SERVICE SYSTEM

Act 78 of 1935

AN ACT to establish and provide a board of civil service commissioners in cities, villages, and municipalities having full-time paid members in the fire or police departments, or both; to provide a civil service system based upon examination and investigation as to merit, efficiency, and fitness for appointment, employment, and promotion of all full-time paid members appointed in the fire and police departments and respective cities, villages, and municipalities; to regulate the transfer, reinstatement, suspension, and discharge of officers, fire fighters, and police officers; to prescribe penalties and provide remedies; and to repeal acts and parts of acts.

Michigan Veterans Preference Act

- **MCL 35.401 Veteran; preference for appointment and public employment; effect of physical impairment; vacancy in elective office; qualifications; conflict with MCL 38.401 to 38.428; "veteran" defined.**

(1) In every public department and upon the public works of the state and of every county and municipal corporation of this state, a veteran shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment that does not, in fact, incapacitate, does not disqualify them. If it is necessary to fill by appointment a vacancy occurring in an elective office, the appointment is subject to this act. The applicant shall be of good moral character and shall have been a resident of the state for at least 2 years and possess other requisite qualifications, after credit allowed by any civil service laws. …

- **MCL 35.61 "Veteran" defined.**

(1) For purposes of all acts of the state relative to veterans, "veteran" means an individual who served in the United States Armed Forces, including the reserve components, and was discharged or released under conditions other than dishonorable. Veteran includes an individual who died while on active duty in the United States Armed Forces.

Act 152 - Employee Health Insurance

- Public Act 152 of 2011 limits the amount that public employers pay toward employee medical benefit plans. The Act contains three options for compliance:

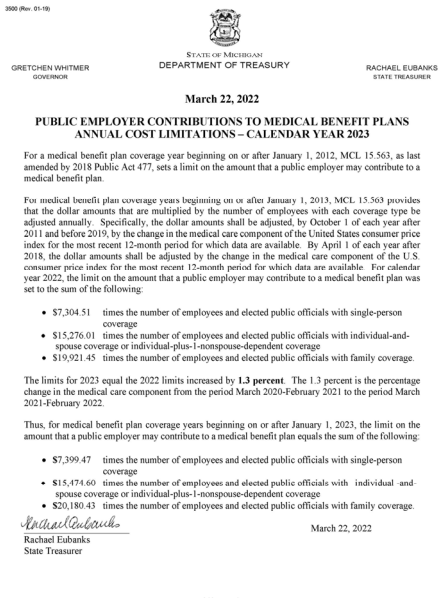
  1) Section 3 - "Hard Caps" Option - limits a public employer's total annual healthcare costs for employees based on coverage levels, as defined in the Act;

  2) Section 4 - "80%/20%" Option - limits a public employer's share of total annual health care costs to not more than 80%. This option requires an annual majority vote of the governing body;

  3) Section 8 - "Exemption" Option - a local unit of government, as defined in the Act, may exempt itself from the requirements of the Act by an annual 2/3 vote of the governing body.

Wait for it!

Each year the Michigan Treasury issues a letter used to calculate the amounts to be considered by the governing body under PA 152.



3500 (Rev. 01-19)

STATE OF MICHIGAN
DEPARTMENT OF TREASURY

GRETCHEN WHITMER
GOVERNOR

RACHAEL EUBANKS
STATE TREASURER

March 22, 2022

PUBLIC EMPLOYER CONTRIBUTIONS TO MEDICAL BENEFIT PLANS
ANNUAL COST LIMITATIONS – CALENDAR YEAR 2023

For a medical benefit plan coverage year beginning on or after January 1, 2012, MCL 15.563, as last amended by 2018 Public Act 477, sets a limit on the amount that a public employer may contribute to a medical benefit plan.

For medical benefit plan coverage years beginning on or after January 1, 2013, MCL 15.563 provides that the dollar amounts that are multiplied by the number of employees with each coverage type be adjusted annually. Specifically, the dollar amounts shall be adjusted, by October 1 of each year after 2011 and before 2019, by the change in the medical care component of the United States consumer price index for the most recent 12-month period for which data are available. By April 1 of each year after 2018, the dollar amounts shall be adjusted by the change in the medical care component of the U.S. consumer price index for the most recent 12-month period for which data are available. For calendar year 2022, the limit on the amount that a public employer may contribute to a medical benefit plan was set to the sum of the following:

- $7,304.51 times the number of employees and elected public officials with single-person coverage
- $15,276.01 times the number of employees and elected public officials with individual-and-spouse coverage or individual-plus-1-nonspouse-dependent coverage
- $19,921.45 times the number of employees and elected public officials with family coverage.

The limits for 2023 equal the 2022 limits increased by **1.3 percent**. The 1.3 percent is the percentage change in the medical care component from the period March 2020-February 2021 to the period March 2021-February 2022.

Thus, for medical benefit plan coverage years beginning on or after January 1, 2023, the limit on the amount that a public employer may contribute to a medical benefit plan equals the sum of the following:

- $7,399.47 times the number of employees and elected public officials with single-person coverage
- $15,474.60 times the number of employees and elected public officials with individual-and-spouse coverage or individual-plus-1-nonspouse-dependent coverage
- $20,180.43 times the number of employees and elected public officials with family coverage.

Rachael Eubanks
State Treasurer

March 22, 2022

www.michigan.gov/treasury

A public employer is prohibited from using blended insurance rates that include both active and retiree health insurance costs when calculating employer and employee contributions toward the cost of health insurance under PA 152.

Whose Duty Is It To Bargain?

(PERA says-)

'A public employer shall bargain collectively with the representatives of its employees ….. and may make and enter into collective bargaining agreements with those representatives.

….. to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party,

but this obligation does not compel either party to agree to a proposal or make a concession.'

What About Grievances?

(Anyone can play)

- Informal communication of employee complaints to responsible supervision can often resolve a matter short of a formal written Grievance.
- When a formal review is called for the CBA should control by having a detailed process.
  - e.g., Time limitations to grieve, meet, answer, and proceed to further steps such as mediation or arbitration.
- A CBA can specify what provider and under what rules a Grievance Mediation and/or Arbitration will proceed.
- Keep in mind that many grievances result from ambiguous drafting in a CBA.

What is MOHAR?

- MOHAR is the Michigan Office of Administrative Hearings.
- Administrative Law Judges hear cases from MERC through MOHAR.
- Most cases assigned to MOAHR originate from the filing with MERC of an Unfair Labor Practice (ULP) charge, a Notice of Public Employee Strike, or a Notice of Public-School Employer Lockout.

(G)ULP?

(Unfair Labor Practice Claims)

- A ULP is a proceeding in which an employer or union has been charged with violating the Public Employment Relations Act or the Labor Mediation Act.
- The most common ULP issues are:

  - bargaining disputes in which one party contends that the other is failing or refusing to negotiate in good faith;

  - allegations that an employer is discriminating against an employee or group of employees because of their union activity; and,

  - claims brought by individual employees against their union alleging a breach of the duty of fair representation.

What Does the Hearing Involve?

(Familiar Things in a Foreign Land)

- Hearings generally apply the same rules of evidence and procedure that are applied in state civil courts.
- Parties often file written motions or briefs prior to a hearing and may be asked to do so after the hearing testimony is taken.
- Hearings are public proceedings unless otherwise ordered by the ALJ.
- Following the hearing, the ALJ will issue a written recommended order.
- That order may be appealed to the full Commission by any party.
- If no appeal is filed, the ALJ's order becomes the order of the Commission and is binding on the parties.

Out of the Box Strategies

(True Stories With Names Changed to Protect the Mostly Innocent)

- Informal Pre-Negotiation Meetings – 'Having the right people, in the right place, at the right time.'
- Dealing with Union Bargaining Teams – 'There is no entrance exam.'
- 'Collaborative Negotiating' - negotiators deal with each other to solve problems together, and to respect their differences as well as their common interests.

  - It can be a powerful, common-sense tool to advance the efforts and achieve the goals of both sides.
- Med-Arb - Same Person, Two Roles- 'Can a bell be unrung?'
- For the Record – 'What did they say?'

Out of the Box Strategies
(No Good Deed…)

- Pitfalls of Conditional Hiring – 'When it takes more than two to tango.'
- Grievance Handling – 'Handling, not handing off.'
- Past Practice – 'Play it again Sam'.
- Why is THAT in there? Everyone liked 'Lenny', so we put it in there for him.
- Drug Testing in a 'Permissive' World – 'Where does random testing get us?'

Common Issues
(Please Leave the Unabridged Dictionary Home)

- Meaning of Words – 'Know of what you speak.'
- Stipulated Awards – 'End run avoiding a penalty.'
- Withdrawal of Claims on Settlement – 'Avoiding a bitter aftertaste.'
- Nothing Personal – 'Keep your eye on the prize.'
- Defined Benefit vs. Defined Contribution – 'Don't confuse 'Defined' with 'Definite'.
- Chapter 9 – 'What, Me Worry?'

The Politics of It All

("There go my people, I must go now to see where I am leading them.")

- Right to what? 'Is Janus in the House?'
- 'How many people does it take to run that train?'
- Union Resources – 'They don't call them 'organized labor' for no reason.'
- Management's Duty to the Public Trust – 'OPM (other people's money)'
- Elected Official's Consent – '18 years of age, 30 days as a resident, and a registered voter.'

Questions?

Resources Used In This Presentation

(Brighter Minds Than Mine)

- Michigan Legislature Website
- Michigan LEO Website
- Michigan MERC Website
- NLRB Website
- MERC Opinions and Awards
- Various Michigan Bar Journal Editions
- Learned papers - written by attorneys much smarter than me
- U of M Law Review Journals - written by law students, again smarter than me
- 'How Arbitration Works' by Elkouri and Elkouri, of course.