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Via electronic and first class mail

Mark Young, Vice President
Detroit Police Lieutenants and Sergeants Association
28 W. Adams
Detroit, MI 48226

Dear Vice President Young:

Early morning after the recent election, on November 7th, you asked me to write a preliminary opinion about the impact of the repeal of Public Act 4. You wanted me to address the concerns that the membership of the Association may have, and how the election would impact them. While more analysis is being done, this letter is a continuation of action that DPLSA has asked me to take concerning the ever-changing legal landscape in Michigan. I will say that your early request for this opinion is further evidence that the DPLSA leadership team is serious about making sure that your members' rights are protected.

In February and March 2012, most of the City's unions negotiated concessionary tentative agreements with the City. This included the TAs negotiated by the DPLSA. The City signed those TAs and posted press releases celebrating the TAs. The Governor, however, interfered and threatened an emergency manager if the Mayor ratified those TAs. The Mayor backed off, and forced through the Consent Agreement instead. On April 4, 2012, the City signed the Consent Agreement.

Michigan's Public Act 4 of 2011 (PA 4), M.C.L. 141. 1501 et seq. provides that a consent agreement may relieve the employer of the obligation to bargain with its unions under Section 15(1) of the Public Employment Relations Act. The Consent Agreement between the City of Detroit and the State contains provisions that are authorized by PA 4. Article 4 of the Consent Agreement is the chief area which labor unions are concerned about (in addition to Annex D), because this Article addresses the unions' ability to continue to bargain with the City.

Monday, the Financial Advisory Board – I understand – took the position that Articles 1, 3 and 4 are no longer operable due to PA 4 being repealed. Paragraph 4.4 of the FSA between the City and the State provides: "It is the State Treasurer's determination pursuant to MCL 141. 1514a(10) that beginning 30 days after the effective date of this Agreement, the City is not subject to Sec. 15(1) of Act 336, Public Acts of Michigan, 1947, as amended, MCL 423.215, for the remaining terms of this Agreement." This Section 4.4 has been interpreted to mean that the City has no further obligation to bargain with the Unions.[1]

Thus, as of May 4, 2012, the City claims that it no longer had a duty to bargain with the City Unions. The consequence of not having a duty to bargain means that the City may prospectively implement terms and conditions of employment without bargaining first. Thus, the City implemented on the DPOA the 10% wage reduction, along with the 12 hour shifts. This was implemented on the DPOA due to the expiration of its bargaining agreement on June 30, 2012. Because the DPLSA continues to have a bargaining agreement, the City was unable to similarly implement such changes on the DPLSA.

The Michigan Constitution, Art. 2, § 9 provides that "[n]o 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." The Board of Canvassers certified the referendum of Proposal 1 on August 8, 2012 (following a Michigan Supreme Court ruling). Proposal 1 was the referendum which sought to repeal PA 4. As you most likely know, PA 4 was repealed by Michigan voters on November 6, 2012.

As such, since August 8, 2012, PA 4 was inoperable. Thus, the City's duty to bargain returned as of August 8th, and, given the subsequent repeal vote the duty to bargain, will now return for good.

Unfortunately, much of what happens next must be resolved in the courts. For instance, I contend that the City had no right to impose any terms and conditions of employment which it had not implemented as of August 8th. The City Employment Terms (CET) was announced in July, but not implemented until late August and later – some of it has still not been implemented. These terms which were not implemented as of August 8th should not be implemented at all.

Secondly, I contend that the Consent Agreement was executed under PA 4, and therefore is no longer valid in principal part. There may be portions of the Consent Agreement that survive the repeal of PA 4. Yet, the chief section which concerns the Unions the most, Article 4 and Annex D, should absolutely go away. Those sections were executed expressly under PA 4, and I contend they are now invalid. Again, these arguments must be made and resolved in the Courts.

[1] I challenge that interpretation on several bases (one is that Section 15(1) is not the only section of PERA which requires the City to bargain with the Unions, and PA 4 did not diminish the City's obligation to follow those other sections).

Bottom line: The City now has a duty to bargain with its Unions. It cannot implement any changes of terms and conditions of employment without bargaining first. It cannot terminate union contracts. This remains the case until the state legislators pass new laws. However, the state legislator will have to consider the majority of state voters who rejected a law that effectively stripped the right to vote of citizens, and stripped the rights of certain employees to collectively bargain.

Finally, you asked about the impact of the loss of Proposal 2. As you know, Proposal 2 was an effort to place the right to collectively bargain into the Michigan constitution. Over the last two years, we have seen the state legislature take many issues off the bargaining table in public employment. The state labor board, the Michigan Employment Relations Commission, posted http://www.michigan.gov/documents/lara/Enacted_Legislative_changesWeb_Chart_395329_7.htm, which is a list of the laws for 2011-2012. The list includes laws that:

- prohibit employers from paying retroactive pay increases (even scheduled step increases) after contract expiration and without a new contract,
- require employees to pay 100% of the cost increases in health insurance after contract expiration and without a new contract,
- cap the amount that an employer is allowed to pay in health insurance costs and burdening employees with the rest, etc.

The list is quite lengthy, and disturbing. It shows how state legislators and the Governor have interfered with local unions and employers working through their financial problems at the bargaining table. With Proposal 2 failing, this list may grow, unfortunately. However, we must continue to press our legislators to leave collective bargaining to the local union officials and management, who know the needs of the locality better than Lansing politicians.

In fact, consider the statement of the City's Project Management Director William Kriss Andrews: "The city's cash-flow crisis is 'more challenging than it's ever been and more challenged than we reported last month …'" (Detroit Free Press, November 12, 2012, Detroit Could Run Out Of Cash By December, Financial Advisory Board Told) In other words, in the seven months since the state took over the finances of the City through the Consent Agreement, the City is worse than ever; and this was after the loss of collective bargaining and effective democratic control. This should demonstrate conclusively that stripping away democratic rights, and stripping away collective bargaining rights, does not improve the financial situation.

Sincerely,

MILLER COHEN, P.L.C.

Richard G. Mack, Jr.

RGM/mc