

# MAMA GLS

## Education Conference

Mission Point Resort, Mackinac Island | June 21-22, 2024



## Rights to Arbitration, PA 312

Helen "Lizzie" Mills, Member, Fahey Schultz Burzych Rhodes



# Agenda

- **PERA and Act 312 Generally**
- **Deep Dive Into PERA**
- **Labor and Employment Considerations & Interlocal Agreements**
- **Bonus Material (if we have time...)**

# PERA

- **Tracks many tenets of private-sector labor laws.**
  - Prohibits interfering with or retaliation for engaging in activities such as union organizing or exercising rights under a collective bargaining agreement.
- **At its core, PERA is about bargaining in good faith.**



# Negotiations Rulebook

- **Rule No. 1: Bargain in Good Faith**
- **Rule No. 2: Bargain over Mandatory Subjects**
- **Rule No. 3: Remember the Process**
- **Golden Rule: The duty to bargain is not a requirement to agree.**



# Duty to bargain is not a requirement to agree. If at impasse after mediation...

## Police or Fire Unit

- File for 312 Arbitration
- Hearing and briefing concluded within approximately 6 months
- Binding Arbitration Award issued on all open issues

## Not Police or Fire

- File for Fact-Finding
- Hearing and briefing (no time limit) result in Report and Recommendation
- Obligation to bargain at least once in 60 days after receiving the award
- Implementation if no luck at that last ditch effort

# What's the Difference?

## Mediation

- Neutral third party facilitates dialogue in a structured process to allow the parties themselves to reach a conclusive and, ideally, mutually satisfactory agreement.
- Process is less formal.
- Confidentiality.
- Mediators aid the parties in identifying interests (as opposed to positions), priorities, obstacles, and the like.
- Focus on communication between the parties, relying on the mediator's facilitative skills to overcome impasse at difficult stages.
- Voluntary and non-binding process that can produce a binding agreement between the parties, if the parties so choose.

## Arbitration

- Most closely aligned with traditional litigation, in that the rules of evidence, witness testimony and standard trial format is typically used.
- Different perspectives presented to a private, independent third-party arbitrator who determines the resolution.
- Typically utilize legal counsel to present the case for the parties.
- Is binding on the parties.
- Arbitrators are not per se bound by existing law or other arbitral decisions.
- Extraordinarily limited review by the court.

# Unilateral Implementation – Non-Police & Fire



- **Ultimate tool to end an impasse**
  - Imposed terms combined with previously agreed upon terms
  - In effect until the bargaining unit makes a material change on an issue that led to impasse.
- **Both parties should consider the challenges presented by implementing terms of a contract after an impasse**
  - Morale
  - Performance
  - Employee Relations

# Police & Fire Arbitration: Act 312 of 1969



- **Compulsory, binding arbitration to resolve disputes over contract terms.**
- **Applies only to police and fire service employees.**
- **Does not replace the duty to bargain or any other obligation under PERA.**
  - Merely adds an arbitrator as an ultimate decisionmaker.
  - No unilateral implementation of contract terms.



**It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.**

***Act 312, Sec. 1***



**Open a hearing (through prehearing conference call) within 15 days of arbitrator appointment.**

**Last Best Offers submitted *before* the hearing.**

- Not necessarily derived from where negotiations failed.

**Decision within 30 (or 90!) days of hearing.**

# Arbitrators Must Consider the Following Factors:

- **Ability to Pay\*\***
  - Financial impact on community of arbitration award
  - Interests and welfare of the public
  - Liabilities—on and off the balance sheet
  - Statutory limitations on governmental expenditures and revenue collection
- **Authority of the Employer**
- **Parties' stipulations**
- **Comparison of wages, hours and conditions of employment**
- **Cost of living**
- **Total compensation package**
  - Direct wages
  - Vacations
  - Holidays
  - Other paid leave
  - Insurance and pensions
  - Medical and hospitalization benefits
  - Continuity, stability of employment,
  - All other benefits received.

# Who Is Act 312 Eligible?



Eligible Employees of public entities	Not Eligible
Emergency Medical Service personnel	Employees of a private EMS co. who contracts with a governmental unit
Emergency telephone operator	Emergency telephone operator employed by <ul style="list-style-type: none"> <li>➤ private co.</li> <li>➤ a 9-1-1 authority or consolidated dispatch center</li> </ul>
Public police officer or firefighter or is subject to the hazards thereof	Employee of a metropolitan district created under PA 147 of 1938 (Huron-Clinton Metropolitan Authority)
Corrections officer employed in a county jail, work camp, or other facility maintained by a county that houses adult prisoners	
	Administrative or support personnel working in an emergency service organization
	Employee of an authority in existence as of June 1, 2011, unless represented in a bargaining unit and a contract provides for coverage under Act 312*

# Bargaining & Interlocal Collaboration

## Tidbits

### **PERA specifically notes its terms are subject to:**

- Municipal Partnership Act (Act 258 of 2011, MCL 124.111 to 124.123)
- Intergovernmental Transfers of Functions and Responsibilities (Act 8 of 1967 (Ex Sess), MCL 124.531 to 124.536)
- Urban Cooperation Act of 1967 (Act 7 of 1967 (Ex Sess) , MCL 124.501 to 124.512)
- Emergency Services to Municipalities (Act 57 of 1988), MCL 124.601 to 124.614)

And don't forget about the Metropolitan Councils Act (Act 292 of 1989, MCL 124.651 to 124.729)



# Municipal Partnership Act (Act 258 of 2011)

- Does not create an employment relationship with the existing employees.
- Don't ignore PERA.
  - The contents or language of the intergovernmental agreement are a *permissive* subject of bargaining, except existing terms of a CBA that obligate successor.
- **But as to the joint endeavor, you cannot bargain:**
  - Whether the local government will enter into a contract.
  - The procedures for obtaining the contract.
  - Identities of the other parties to the contract for a joint endeavor.

# Intergovernmental Transfers of Functions and Responsibilities Act, Urban Cooperation Act, & Emergency Services to Municipalities Act

- The enabling legislation does not create an employment relationship with the existing employees.
- Before the effective date of the joint exercise, identify, in writing, which employees will be transferred.
- The contents or language of the intergovernmental agreement are a permissive subject of bargaining, except existing terms of a CBA that obligate successor.
- No req't to assume any collective bargaining agreement for the long term.
- Transferred employees represented by a labor organization are subject to their previous terms and conditions of employment until the earlier of:
  - a terms and conditions of employment are modified in accordance with PERA, or
  - 6 months after the transfer.





## Bargaining Under These Acts...

- **Begin no later than 180 days before the transfer date.**
  - The old bargaining rep continues, but the employees can exercise their rights to change representatives (or decertify) on and after day the joint exercise of power becomes effective through its contract.
- **Unless otherwise mutually agreed, MERC can conduct a representation election if:**
  - multiple labor organizations assert the right to represent all or part of the workforce *or*
  - where a substantial portion of the transferred employees were not previously represented.

# The Metropolitan Councils Act

- Employee whose duties are transferred to a metropolitan council *shall* be given a position of a comparable description and retain the seniority status and benefit as held before the transfer.
- The council may bargain collectively and enter into agreements with labor organizations pursuant to PERA.
- Council shall immediately assume and be bound by an existing labor agreement for the remainder of the term of the labor agreement.
  - The old bargaining representative continues after the transfer, although the employees can exercise their rights to change representatives (or decertify).

# TIPS

- Evaluate which act suits the needs of the joint effort both in service or power to be exercised and for purposes of labor and employment matters
- Know your employee needs: each maintain their own, or establish anew?
- Assess what obligations exist:
  - CBA?
  - Handbook?
  - Unwritten rules?
- How will you determine who is transferred, laid off, etc.
  - Check your CBA on the layoff component

# **ADDITIONAL NOTES ABOUT POLICE AND FIRE EMPLOYMENT ISSUES**

- **Trade time**
- **Overtime compensation**
- **Compensatory Time**
- **Off Duty Conduct**



# Trade Time

- Under certain conditions, public agency employees may trade shifts for each other without impacting hours worked for overtime purposes. This requires:
  - Some approval mechanism and
  - That the trade is voluntary
- **“Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.” 29 CFR §553.31.**

# Overtime Compensation and Exceptions

- **Employees must be paid 1 ½ times their regular rate of pay for all hours worked over 40 in a workweek.**
  - Do not “balance” the hours across a pay period to determine overtime compensation eligibility.
- **There are relevant *limited exceptions* to this.**



# When Overtime Pay is Due Can Change!

- **Never Due**: Employees of law enforcement or fire protection departments are exempt from overtime pay if fewer than 5 employees are employed by the department.
- **Higher Hour Threshold**: A partial exemption from overtime exists if employees in fire protection or law enforcement have a work period of between 7 and 28 consecutive days.
  - Fire protection - 212 hours in 28-day period (or a related ratio!)
  - Law enforcement - 171 hours in 28-day period (or a related ratio!)

# Comp Time in Lieu of Overtime Pay

- **May permit accumulating time off at a rate of 1.5 hours per hour of OT worked, if you have a proper comp time program before performance of the work.**
- **Requests to use comp time must be granted within reasonable time, unless it would unduly disrupt operations.**
- **May freely substitute cash for time off without prejudicing ability to grant time off in future.**
- **Must pay out unused compensatory time upon separation.**
- **Maximum comp time banks:**
  - General employees: 240 hours of comp time (for 160 hours of OT worked).
  - Public safety or emergency response personnel: 480 hours of comp time (for 320 OT hours worked).
    - Public safety includes law enforcement and firefighting activities.
    - Emergency response includes dispatching emergency vehicles and personnel, rescue work and ambulance services.



# Off Duty Conduct and First Amendment Protections from Discipline

- **But I'm off duty!"**
  - Look for that Nexus
- **First Amendment Rules to Live By**





## **HELEN “LIZZIE” MILLS**

**Partner, Fahey Schultz Burzych Rhodes PLC**

**[fsbriaw.com](http://fsbriaw.com) | [hmills@fsbriaw.com](mailto:hmills@fsbriaw.com) | 517.381.0100**

**Lizzie loves to read: add her on Good Reads!**

**She loves live music and looks forward to her annual DMB concert (coming this Wednesday!)**

**As an SVSU alumna, she says “GO Cards!”**

***As a GLS Council Member, Lizzie asks you to get involved.***