MICHIGAN COUNCIL 25

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July 16, 2012

VIA FACSIMILE AND HAND DELIVERY

Honorable Detroit City Council
2 Woodward Ave., Rm. 1340
Detroit, Michigan 48226

Krystal Crittendon, Esq.
Corporation Counsel
660 Woodward Ave., Ste. 1650
Detroit, MI 48226

Re: The City's Effort to Impose New Employment Terms
File No. 100000.1219 *[Log #3004-CD-12]*

Dear Honorable City Council and Corporation Counsel Crittendon:

With this letter, the Coalition of Detroit Unions formally asks you, Madam Corporation Counsel, to issue a legal opinion indicating that the City of Detroit may not impose employment terms on its unionized workforce, because of the City's duty to bargain with the unions. This duty is found expressly in the City of Detroit Charter. As you know, it is your obligation to enforce the City Charter, over and above any actions taken by agents of the City which may contradict the express provisions of the Charter. If the leadership of the City refuses to comply with your opinion of an existing duty to bargain, we then ask that you seek "judicial action" to require such bargaining. Charter 7.5-209.

The Coalition learned Friday that the City Council planned on imposing new employment terms on the unionized employees within the Coalition. We learned that the City Council contemplated a vote on the terms as early as Tuesday, July 17th. Thus, we are asking you all, the Honorable City Council and Corporation Counsel, to withhold approval of any new employment terms until the legal issues raised below are explored and resolved.

At bottom, the Coalition signed, with the Mayor, a Tentative Agreement which saved the City tens of millions of dollars. Our position is that the TA should be executed, in the course of the City's duty to bargain.

Also addressed in this letter, briefly, is the fact that these unionized employees appear to face worse treatment than their non-union counterparts. There are sections of the City Charter and Code of Ordinances which lay out employment terms and conditions for City employees. If the City is terminating the union contracts, which we challenge, then at a minimum the employment terms therein should apply.

I. Why the Unions Are Raising the Issue Now

The City is seeking to dramatically change employment terms of thousands of unionized City employees, without even giving them notice. The Coalition was never told about these new financial employment terms that were approved by the Financial Advisory Board late last week. On or about June 29, 2012, the Coalition Unions were given a sixty-two (62) page document entitled City Employment Terms. While containing some very Draconian provisions, this document did not include many economic changes (i.e., wages, health care, pension). None of the unions were able to negotiate these provisions, but were merely given the provisions. Some Unions had short meetings about the new provisions.

In early July 2012, a shorter version of the City Employment Terms surfaced. The Coalition was not told which of the two versions would be advanced for approval by the City. Then on Friday, July 13th, the Coalition leadership read in the paper that the City contemplated imposing new financial terms on the City's Unions. These terms were different than those negotiated in the Coalition Tentative Agreement. Further, the City never even notified the Unions about the new financial terms, let alone bargained concerning them.

Even more, the Coalition leadership sought certain information concerning the City's current – and frequently changing – bargaining positions, in order that the Coalition may assess why the City was in need of what it proposed. The City repeatedly promised to provide the information. The information has not been provided to date.

The City is acting as if the Unions do not exist, and as if the City's workforce is at-will. For the City to implement financial terms on the unionized workforce without any notice – let alone bargaining – is illegal; even more, it is disrespectful. It devalues the decades of service that these thousands of hard-working, and underpaid, workers have given to this struggling City. It also is a slap in the face to the Coalition membership, who spent months in rushed negotiations to come up with significant concessions that have also been ignored.

II. The City Has a Duty to Bargain with the Unionized Workforce Per City Charter

The electors of the City of Detroit have seen fit to craft within their Charter the right of unionized employees to bargain with the City of Detroit. The City Charter, Section 6-407 states:

> "Sec. 6-407. - Employee Organization.
>
> Employees of the City have the right to collective organization and collective bargaining."

(emphasis added) Thus, the City Executive branch has a duty to bargain with the Unions. Further, Section 6-408 of the Charter requires that bargaining agreements be negotiated with the Unions:

> "The Labor Relations Division shall act for the City under the direction of the Mayor, in the negotiation and administration of collective bargaining contracts.

> The City Council must ratify any collective bargaining contract agreed to between the City and the respective union before it becomes effective.
>
> The terms of any collective bargaining contract, and all rules and rulings made under it, shall take precedence over any inconsistent classifications, rules, or policies of the Human Resources Department."

Charter Sec. 6-408.

The duty to bargain is interpreted in state labor law to mean that the City as an employer cannot change wages, hours, or other terms and conditions of employment, without first bargaining with the Unions to "impasse." The City is proposing to change wages, health care, pension, and other benefit changes. All of these issues are referred to as "mandatory subjects of bargaining" and the "duty to bargain" in state labor law requires that the City negotiate these changes with the Union, to impasse, before making any changes. ***Detroit Police Officers Ass'n v. City of Detroit***, 391 Mich. 44 (1974)

III. Public Act 4 Does Not Negate this Charter-Mandated Duty to Bargain

The City will claim that Public Act 4 (2011 Public Act 4) prohibits the City from bargaining with City Unions, now that a consent agreement is signed. This is false. It is true that Public Act 4 permits the City to disregard one section of state labor law (the Public Employment Relations Act), but it does not permit it to disregard the other sections which also require bargaining. More importantly as to the role of Corporation Counsel and the City Council, it should not be interpreted to negate the Charter requirement.

In short, Public Act 4 states the City is NOT OBLIGATED to comply with one provision of PERA concerning a duty to bargain. However, you should find that nothing in Public Act 4 or the Consent Agreement states that the City is PROHIBITED from bargaining with City Unions. Thus, the City may still require its Executive branch to bargain with Unions, notwithstanding Public Act 4. You should consider the City to have done so in its Charter.

Public Act 4 states as follows, concerning the City's duty to bargain given a consent agreement:

> (10) 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.

M.C.L. § 141.1514a(10) (emphasis added).

The referenced Section 15(1) states, in part, that the "A public employer shall bargain collectively with the representatives of its employees as described in Section 11 [footnote omitted] and may make and enter into collective bargaining agreements with those

representatives." This Section says the City shall bargain with the Union, and may enter into a bargaining agreement. Later, that same paragraph defines duty to bargaining to include "to negotiate an agreement" and "to execute a written contract, ordinance, or resolution incorporating any agreement reached ..."

Thus, the City is "not subject to" the duty encompassed in Section 15(1) of PERA, referencing the duty to bargain. You should find that while the City is "not subject to" Section 15(1), that does not mean the City is prohibited from bargaining. You should find that nothing in Public Act 4 prohibits the City from deciding to bargain with its Unions.

Here, the City of Detroit has decided to bargain with its Unions, by virtue of Charter, Sec. 6-407. It is often the case that a local unit of government will impose on its leadership requirements which are greater than that called for under state law. ***Miller v. Fabius Twp. Bd.***, 366 Mich. 250, 114 N.W.2d 250 (1962) (citing a legal treatise asserting that "[t]he mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements.")

Even more, the state constitution protects the right of the citizens of Detroit to craft their own charter. The Michigan Constitution states that

> "Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village."

M.C.L.A. Const. Art. 7, § 22.

IV. Notwithstanding Public Act 4, State Labor Law Continues to Bind the City to Bargain with its Unions

Beyond Article 6-407 of the Detroit Charter, three other sections of state labor law also require the City to continue to bargain with the Unions. These provisions were not negated by Public Act 4. For instance, Section 10 of PERA states that

> "A public employer ... shall not (e) Refuse to bargain collectively with the representatives of its public employees, subject to the provisions of Section 11."

MCLA § 423.210(1)(e)(emphasis added). This provision was not tampered with by Public Act 4, and the obligation remains on the City to comply with such.

Section 11 states that unions voted in by a majority of the unit employees "shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer ..." (emphasis added) See also Section 9 of PERA, MCLA § 423.209.

Thus, because the City remains bound to comply with Sections 9, 10, and 11 of PERA, the City remains bound by state labor law to bargain with its Unions.

V. The Consent Agreement Was Executed Pursuant to the Charter, and Should Not Be Seen As Negating this Charter-Mandated Duty to Bargain

The Administration will point to the Consent Agreement itself as its basis for being able to ignore the Unions, disregard its obligation to bargain under the City Charter and state labor law, and impose these new employment terms on its workers without notice. This is false.

The Unions contend that the Consent Agreement is an illegal document itself, executed in violation of a host of state and federal laws, including constitutional provisions. A major problem is that the City is applying Public Act 4 as negating this obligation to bargain. The Unions believe that Public Act 4 itself is illegal.

Aside from these legal challenges, the Unions assert that the Consent Agreement should be interpreted to assure compliance with the City Charter. The following sections of the Consent Agreement are among those supporting this notion:

* Opening statement by Mayor Bing – "Of critical importance to Detroiters, this agreement preserves City Charter, Executive and Legislative powers."

* Page 3, Whereas Clause – "WHEREAS, approval of this Agreement is intended to reaffirm the role of the City's executive and legislative branches under the Charter in the development of the strategy, policies and long-term vision of a revitalized City"

* Page 3-4, last Whereas Clause – "WHEREAS, under this Agreement the City and the Treasury Department agree to jointly exercise powers relating to public finance, budgeting, and administration that they share in common and that each may exercise separately … and the comprehensive home rule and other powers, privileges and authority of the City to enter into contracts on matters of municipal concern including, but not limited to, under Act 279, the Charter, and other applicable law"

* Page 9, Section 1.3a(c) – The Financial Advisory Board's ability to establish ethics rules is limited by the language in the Charter.

* Page 16, Section 2.1 – "Powers and Authority. The Mayor and the City Council shall continue to exercise all such powers, privileges and authorities as are granted to each under the Charter and applicable law."

* Page 16-19 – Both the Chief Financial Officer (Section 2.2(a)), and the Program Manager (Section 2.2(c)) are treated as Directors under Section 5-103 of the Charter and they, therefore, are required to abide by the Charter. Thus, neither

position can impose employment terms without complying with Charter Section 6-407, by engaging in bargaining with the Unions beforehand.

* Page 33, Section 4.3 – Labor Relations shall negotiate contracts, and City Council shall ratify contracts, pursuant to the Charter.

Second, the Consent Agreement should be interpreted to maintain the City's duty to bargain, and to prevent the Mayor from imposing employment terms without bargaining. The Consent Agreement was executed under Public Act 4. Nothing in Public Act 4 should be interpreted to permit the Mayor under a Consent Agreement to exercise broader powers than he has under the City Charter. Indeed, Public Act 4 states that when a consent agreement is in place, the Mayor's powers are granted specifically in the agreement. MCLA § 141.1514a(9). Thus, one has to look to the Consent Agreement itself to see what power Mayor Bing was granted.

Here, the City's powers regarding the union workforce are found in Article 4 and Annex D. Article 4 is entitled "Collective Bargaining Agreements." Thus, the entire Section addresses "agreements" – or contracts agreed upon by both sides. This Article does not address the right of the City to impose contract terms that are not agreed upon.

Nothing in Article 4 of the Consent Agreement should be interpreted to permit the Mayor to impose employment terms without first bargaining to impasse. Section 4.1 says that the Mayor has the right to negotiate and execute bargaining agreements. Section 4.2 says that any bargaining agreement must comply with the terms in Annex D. Section 4.3 addresses the manner in which new bargaining agreements are approved. Article 4.4 states that the obligation under Section 15(1) of PERA (discussed above) is not applicable to the City.

Nothing in Annex D should be interpreted to permit the Mayor to impose employment terms without first bargaining to impasse. Annex D states that

> "On or before July 16, 2012, the City shall have either negotiated or imposed new labor agreements with those Unions whose contracts have expired or will expire on or about June 30, 2012. [It then lists guidelines which the new agreement should meet, many of the guidelines being quite vague.]

First, there is no such thing as an "imposed [] labor agreement" as mentioned in the above quote – but instead imposed employment terms. (Logically, there can be no "agreement" if the Unions did not agree to it.) Regardless, it is important to note that the Consent Agreement was executed pursuant to "applicable law." See e.g., Section 4.3. State labor law provides that the employers may impose contract terms AFTER negotiations to impasse. ***Port Huron Ed. Ass'n v. Port Huron Area School Dist.***, 452 Mich. 309 (1996). Neither Public Act 4 nor Annex D state that the imposition spoken of in Annex D must occur before bargaining to impasse. It merely states that either must occur by a set date.

Thus, it is very possible to interpret the City's duty to bargain to impasse in harmony with the Consent Agreement. The law requires interpreting contracts and laws in such a manner, if in fact possible. See, e.g., ***Herman v. Berrien Co.***, 481 Mich. 352, 366, 750 N.W.2d 570 (2008) The City is obligated to bargain with its unions, before imposing anything. Here, the City has done that in the Tentative Agreement that it signed with the Coalition.

VI. The Other Terms of City Laws Must Apply to the Unions, at a Minimum

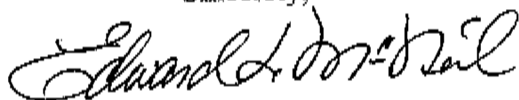
The Coalition rejects the notion that the City can impose terms without bargaining to impasse. However, even if the City can do so, the City should explain, at a minimum, why the current employment terms for City employees found in the Charter and Code of Ordinances would not apply to the Unionized workforce. See Charter Sec 2-108 and Chapter 13 of the Code of Ordinances.

VII. Conclusion

It is a shame that this Consent Agreement was drafted without the inclusion of the City's Corporation Counsel, who is vested with authority to assure that the City's Charter and laws are complied with. We ask the City Council not to make that same mistake twice. Do not approve any new employment terms for Coalition employees until these legal issues have been resolved.

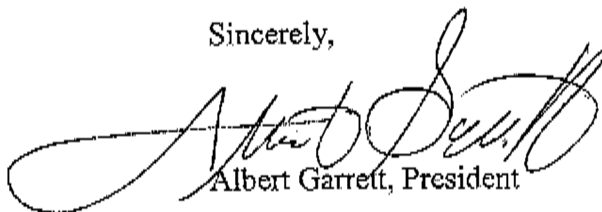
We urge the Corporation Counsel to review the above, and issue an opinion which prohibits imposition of these new employment terms.

Sincerely,



Edward McNeil

Sincerely,



Albert Garrett, President

cc: Joe Valenti
Richard Mack, Esq.
Mayor Dave Bing