

**THE PUBLIC EMPLOYMENT RELATIONS ACT:**  
Conflicts and Possible Alternatives

\*  
\*\*\*  
\*

**CITIZENS RESEARCH COUNCIL OF MICHIGAN**

625 Shelby Street  
Detroit, Michigan 48226-4154

1502 Michigan National Tower  
Lansing, Michigan 48933-1738

REPORT NO. 283

JANUARY 1987

**THE PUBLIC EMPLOYMENT RELATIONS ACT:  
Conflicts and Possible Alternatives**

**TABLE OF CONTENTS**

	PAGE
<b>Introduction.....</b>	<b>1</b>
<b>Part I. Provisions of the Public Employment Relations Act.....</b>	<b>2</b>
A. Subject Matter and the Duty to Bargain.....	2
1. Mandatory, Permissive and Illegal Subjects .....	2
2. The Duty to Bargain .....	3
B. Areas of Conflict Between PERA and other Law.....	4
1. Bargaining Jurisdiction .....	5
2. Autonomy of Higher Education Institutions .....	6
3. Autonomy of Local Governmental Units .....	7
Residency. Retirement. Differential Benefits. Grievance and Disciplinary Procedures. Minimum Staffing.	
4. Teacher Tenure .....	11
5. The Judiciary .....	11
Application of PERA to Lower Courts. Application of PERA to the Supreme Court.	
<b>Part II. The Relationship of PERA to Compulsory Arbitration.....</b>	<b>14</b>
<b>Part III. Alternative Approaches.....</b>	<b>16</b>
A. General Considerations.....	16
B. Existing Court Precedent Could Be Codified by the Legislature.....	16
C. The Legislature Could Specifically Define the Scope of Bargaining.....	18
D. PERA Could Be Made to Complement, but not Supersede More Specific Charter Provisions or Statutes.....	19
E Act 312 Could Be Made to Complement, but not Supersede More Specific Charter Provisions or Statutes.....	21

**THE PUBLIC EMPLOYMENT RELATIONS ACT:  
Conflicts and Possible Alternatives**

**Introduction**

The state Legislature in 1965 adopted Public Act 379, the Public Employment Relations Act (PERA). The legislative authority to enact PERA derives from Section 48 of Article 4 of the state Constitution. Section 48 empowers the Legislature to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." One purpose of PERA was to standardize the process by which public sector collective bargaining in Michigan was to occur. Public employees, regardless of where situated in the state, could look to a single, comprehensive state statute as the source for their collective bargaining rights, rather than to a patchwork of ordinances or charter provisions. The collective bargaining framework established by PERA, and as interpreted by state courts, has not always meshed smoothly, however, with existing constitutional provisions.

Local governmental units in Michigan are accorded powers of home rule by the state Constitution. The concept of home rule is a longstanding tradition in this state. One of the tenets of home rule is that the electors of a charter unit be accorded the flexibility to shape their local government structure as their needs require, subject of course to the Constitution and general law. Conflicts between the constitutional right of home rule and the constitutional authority of the Legislature to provide for the resolution of public sector employment disputes through statewide law have proven difficult to resolve. Constitutional conflict has also arisen between the autonomy guaranteed to the state's public higher education institutions, by Sections 4 through 6 of Article 8 of the state Constitution, and the Legislature's authority to provide for collective bargaining for public employees, including those employed by colleges and universities.

Conflicts not of constitutional dimension have likewise arisen between PERA and other statutes. The Legislature has enacted laws governing a variety of distinct substantive areas, among which several are pertinent to this analysis. Public Act 370 of 1941 as amended, the County Civil Service Act, provides for the adoption of merit principles in counties with a specified population. Public Act 279 of 1909 as amended, the Home Rule Cities Act, sets forth the procedures by which cities may incorporate. Public Act 4 of 1937 (ex session) as amended, the Teachers' Tenure Act, governs the tenure aspects of certificated teachers in the state's public educational institutions. Public Act 345 of 1937 as amended, governs local police and firefighter pensions.

The state Supreme Court has held in a series of cases, to be discussed below, that PERA is the predominant state statute governing public employment relations in Michigan. When a conflict has arisen between another state statute, charter provision, or local ordinance, and a provision of a contract negotiated under PERA, in virtually every instance the contract provision has been held to prevail.

One result of the dominance of PERA, as Attorney General opinions have noted, is that "public employers and their affected employees [have] the right to, in effect, negotiate a statute out of existence as to the contracting parties through collective bargaining." (OAG 1983-84,

No 6244 at 369.) This raises serious concerns because the provisions "bargained out of existence" by the parties may contain safeguards which were enacted at the state or local level to limit the scope and size of government. It is doubtful that the people of Michigan, by approving Section 48 of Article 4 of the state Constitution, intended to mandate that all other laws, and indeed other provisions of the state Constitution, were to become mere appendages to the Legislature's authority to resolve public sector employment disputes. Neither is it clear that the Legislature chose to give PERA an exalted status over its other enactments in related areas. Nevertheless, the cumulative effect of court decisions has been to create this result. This report discusses the development, through judicial interpretation, of public sector collective bargaining law in Michigan and possible alternatives.

## **Part I. Provisions of the Public Employment Relations Act**

Section 15 of PERA imposes upon public employers and public unions the mutual obligation to bargain in good faith on matters "with respect to wages, hours, and other terms and conditions of employment...."

### **A. Subject Matter and the Duty to Bargain**

#### **1. Mandatory, Permissive, and Illegal Subjects**

Subjects of bargaining fall generally into one of three categories: mandatory, permissive, and illegal. A **mandatory subject** of bargaining is one upon which, when brought up by either party, both parties are obligated to bargain. An example of a mandatory subject is residency when used as a condition for continued employment. The failure to bargain in good faith upon a mandatory subject of bargaining constitutes an unfair labor practice.

**Permissive subjects** fall without the scope of "wages, hours, and other terms and conditions of employment" and may be bargained upon only at the consent of both parties. An example would be employment recruitment criteria. Because recruitment standards govern the selection of potential employees before an employment relationship is established, they are outside the scope of "other terms and conditions of employment."

A third category is generally referred to misleadingly as **illegal subjects** of bargaining. Such subjects are not illegal in the sense that they may not lawfully be bargained upon. Rather, if agreement is reached upon such a subject, the contractual provision containing it cannot be enforced because to do so would be violative of law or public policy. An example of an illegal subject would be a provision calling for a closed shop. Section 10(c) of PERA makes it unlawful for a public employer, or his or her agent, to "discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization...."

No precise line has been drawn, to the one side of which a matter is clearly a mandatory subject of bargaining and to the other side of which a subject is permissive or illegal. Section 15 of PERA defines mandatory subjects to be "wages, hours, and other terms and conditions of employment," because it is upon these matters that the statute imposes a duty to bargain.

Both "wages" and "hours" have fairly definitive meaning, but whether a particular matter falls within the scope of the phrase "other terms and conditions of employment" has been left for determination by the courts. The failure of the Legislature to provide a precise definition has proven a major source of ambiguity.

The Legislature enacted language in Section 15 of PERA which is virtually identical to that found in Section 8(d) of the National Labor Relations Act. Section 8(d) has been a part of the federal statute since the Taft-Hartley amendments of 1947 and has been extensively litigated. Since the federal statute offers no definition of "wages, hours, and other terms and conditions of employment," this likely accounts for the Legislature's failure to define the phrase. Michigan courts have found this fact to be significant. Congress implicitly left the matter of definitions to the federal courts, which have employed a method of case by case adjudication. Michigan courts, in construing the scope of the duty to bargain and the categorization of bargaining subjects under Section 15 of PERA, have sought guidance from the considerable body of federal case law construing Section 8(d).

The difficulty with the approach selected by the Legislature lies in the fact that both the National Labor Relations Act and the federal case law construing it regulate private sector collective bargaining, while PERA was intended to govern the public sector. The employment relationship which exists in these two sectors is fundamentally different because the motives of the private employer differ fundamentally from those of his public sector counterpart. The former acts to further his or her own private economic interest, chiefly to earn a profit, whereas the public employer exists to provide services, many of which may be mandated by law.

## **2. The Duty to Bargain**

The use of a private sector, industrial model for public sector collective bargaining also presents difficulties with respect to the duty to bargain. In the private sector, the duty to bargain in good faith upon mandatory subjects imposes no corresponding duty to arrive at an agreement, nor does it dictate the precise terms of an agreement. Where the parties bargain to impasse on a mandatory subject without reaching agreement, the statutory obligation is satisfied. Unilateral action may then be taken by the employer, provided it is consistent with the last offer of settlement.

PERA imposes upon public employers and unions a duty to bargain similar to that of the private sector and state courts have construed it similarly. "In essence the requirement of good faith bargaining is simply that the parties manifest such an attitude and conduct that will be conducive to reaching agreement." **Detroit Police officers Association v City of Detroit**, (391 Mich 44, 54; 1974). It is unfortunate that state courts have also borrowed from federal, private sector case law when attempting to describe the extent to which unilateral action is permissible under PERA, despite the fact that notable restrictions exist in the public sector. For example, the public policy of Michigan prohibits strikes by public employees, even though the concerted withholding of one's services is the only significant unilateral action that unions have at their disposal.

Secondly, the prevalence of alternative dispute resolution procedures has limited the freedom of both public employers and unions to act unilaterally. For example, the Michigan Employment Relations Commission (MERC), the state agency charged with the administration of PERA, has taken the view that when either party to a contract negotiation has requested factfinding, unilateral action may not be taken until impasse is also reached with respect to the factfinder's report.

Finally, with respect to those public safety employees covered by the state's compulsory arbitration law, the statutory duty of the parties is not met simply by manifesting good faith in an attempt to reach agreement. An arbitrator, acting pursuant to Act 312, has the ultimate authority to impose an agreement on any mandatory subject at issue.

#### **B. Areas of Conflict Between PERA and Other Law**

The state Supreme Court "has consistently held that PERA prevails over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the Constitution carve out exceptions to PERA." **Local 1383, International Association of Fire Fighters, AFL-CIO v City of Warren**, (411 Mich 642, 654; 1981). The Court stated in **Rockwell v Crestwood School District Board of Education**, (393 Mich 616, 630; 1975), that "the supremacy of the provisions of the PERA is predicated on the Constitution (Const 1963, art 4, sec 48) and the **apparent** legislative intent that the PERA be the governing law for public employee labor relations." (Emphasis supplied.)

These cases have not been decided precisely on preemption grounds, the effect of which would be to preclude a local law from addressing the same general area as the state statute. Rather, the cases have generally involved a conflict between PERA and some other state statute or local action taken pursuant to a state statute.

Neither the title nor the various sections of PERA evince a legislative intent to repeal other laws which might prove inconsistent with its terms, and the courts have been reluctant traditionally to find repeal by implication. There is likewise no language in the collective bargaining statute, excepting Section 6 (which defines strike activity and provides a procedure whereby public employees who engage in such activity may be disciplined), to indicate the Legislature intended to supersede any other statute.

It is of note that Section 6 of PERA, the construction of which was involved in the **Crestwood** case, begins with the phrase "[n]otwithstanding the provisions of any other law..... This makes reasonable the inference that when the legislative intent was that a provision of PERA **should** prevail with respect to a specific area, the Legislature so stated.

The courts have sought where possible to resolve conflicts in such a manner as to leave both PERA and the conflicting law intact. Where such resolution has not been possible, however, PERA has been held to predominate. Central to the courts' reasoning has been the fact that PERA mandates only good faith bargaining, but does not obligate an employer to agree. The case law concerning conflicts between PERA and other laws can be divided into several distinct categories. These cases have dealt with bargaining jurisdiction; the autonomy of higher

education institutions; the autonomy of local governmental units; teacher tenure; and the application of PERA to the courts.

## 1. Bargaining Jurisdiction

The people of Michigan amended the state Constitution in 1940 to provide for a system of civil service to govern state employment. The end to be obtained by civil service was that the employment and promotion of the state government work force would occur through merit and demonstrated skill rather than as a result of political spoils.

The Legislature in 1941 adopted the County Civil Service Act, presumably to achieve the same end at the county level as the constitutional amendment would with respect to state employment. The county civil service commission bore the statutory duty to establish classifications and uniform rates of pay. In addition to its enumerated duties and powers, the commission was to "have such other powers and perform such other duties as may be necessary to carry out the provisions" of the act. The framework established by the act of 1941 did not contemplate, however, collective bargaining by public sector employees. Collective bargaining in the public sector was as yet undeveloped and would not be comprehensively addressed by the Legislature until PERA was adopted in 1965.

The case of **Wayne County Civil Service Commission v Board of Supervisors**, (384 Mich 363; 1971), involved a direct conflict between these two statutes. The county civil service commission filed suit against the county board of supervisors and the county road commission seeking a declaratory judgment that the 1941 act "made the (civil service commission) the exclusive bargaining agent for all employees of the County of Wayne," subject to approval by the county board of supervisors on matters respecting salaries and wages. (384 Mich at 370.)

The case involved a problem which recurrently haunts public sector collective bargaining: the ascertainment of what individual or body constitutes the "public employer." In the public sector, governmental authority tends to be dispersed among several branches. For example, a municipal labor relations or personnel department, which is generally part of the executive branch, may have the responsibility for conducting collective bargaining with a public union. The actual funding of whatever agreement is reached, however, requires the appropriation of money, a function typically committed to the legislative body. Thus, the separation of powers can fragment the authority needed to bargain collectively in a manner not found in the private sector. PERA, while imposing upon a public employer the duty to bargain, fails to define the term public employer.

While the civil service commission contended the county was the employer, the commission nevertheless argued that its own statutory duty to establish classifications and uniform rates of pay permitted it to act on behalf of the county's employees. The county road commission, however, claimed to be the public employer with respect to its employees.

---

\*There are a number of matters which, though related, are regrettably beyond the limited scope of present analysis. They concern which employees may bargain collectively; the appropriate composition of a bargaining unit; and a detailed treatment of the difficulty of defining the public employer.

The Court stated in a **per curiam** opinion that it was not engaging in ascertaining legislative intent. The Court noted that there was

no hint in this new title or, for that matter, in any of the sections of the act of 1965, any legislative thought that the prohibition of strikes by public employees \* \* \* might conflict in whole or in part with the authority vested, by the act of 1941 in an established county civil service commission. (384 Mich at 369.)

There was in essence no legislative intent to be gleaned because the Legislature had not contemplated any possible conflict. The Court "guessed" at the intent the Legislature might have provided had it been presented with the conflict. The Court held that the county was indeed the public employer, for purposes of PERA, except for road commission employees, with respect to whom the road commission was the public employer.

More importantly, the Court held that "the original authority and duty of the plaintiff civil service commission was diminished **pro tanto** (to the extent necessary), by the act of 1965, to the extent of free administration of the latter according to its tenor." (384 Mich at 374.) The civil service commission was to play no role in the administration of collective bargaining because the provisions of PERA were predominant. The **Wayne County Civil Service Commission** case set the stage for what was to come.

## **2. Autonomy of Higher Education Institutions**

The state's public higher education institutions are granted autonomy by the state Constitution. The autonomy of each institution, which is vested in a governing board, extends to the general supervision of the institution, and to the control and direction of expenditures from the institution's funds.

These institutions also employ substantial numbers of public sector employees, who are not part of the state civil service system. The conditions of employment for and compensation of these employees has an obvious impact on the expenditure of funds by these institutions. Legislative authority to provide for collective bargaining for public employees, including those employed by constitutionally autonomous colleges and universities, has given rise to conflict, which state courts have on several occasions been called upon to resolve.

In the case of **Board of Control of Eastern Michigan University v Labor Mediation Board**, (384 Mich 561; 1971), the Court held that a Michigan institution of higher education is a public employer for purposes of PERA. The Court held that Section 6 of Article 8 [dealing with baccalaureate degree granting institutions other than Michigan State University, the University of Michigan and Wayne State University], which states in part that the board of control governing such an institution "shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds," did not remove such an institution from the scope of PERA.

The Court noted (quoting from the Court of Appeals decision in the same case, (18 Mich App 435; 1969)), that PERA did not impose upon Eastern Michigan University "an obligation \* \* \* to agree to any pro-

posal or to require the making of a concession. Neither party is forced under the act to enter into any agreement. " (384 Mich at 564.) As a result, the university was not divested of its authority for the "general supervision of the institution and the control and direction of all expenditures from the institution's funds."

A like result was reached in **Regents of the University of Michigan v Employment Relations Commission**, (389 Mich 96; 1973). In that case, certain interns, residents, and post-doctoral fellows Affiliated with the university hospital organized into an association for purposes of bargaining collectively with the university. The board of regents of the university refused to recognize the association as the exclusive bargaining agent for the interns, residents, and post-doctoral fellows. In addition, the university claimed the right to unilaterally determine compensation for its employees.

The university had unsuccessfully asserted before the Employment Relations Commission that no "employment" relationship existed because those seeking recognition were students rather than employees. The Court had held in the **Eastern Michigan University** case, however, that public employment applied to employment or service in all governmental activity, whether carried on by the state or by townships, cities, counties, commissions, boards or other governmental instrumentalities." (384 Mich at 566.) As will be discussed below, the Court ignored this sweeping language eight years later when certain of its own employees sought to unionize.

With respect to the principal case, the Court held that the University of Michigan interns, residents, and post-doctoral fellows were covered by PERA. The statutory framework did not make an exception for "student-employees." "The only exception [was] for the classified civil service." (389 Mich at 96.) The Court also held the university was a public employer based upon the result reached in the **Eastern Michigan University** case.

The Court in the **University of Michigan** case did recognize a limitation upon the reach of PERA where autonomous educational institutions were involved. Collective bargaining did not extend to matters "within the educational sphere" of the institution. (389 Mich 109.) Which matters were within and which without the "educational sphere" was not precisely defined. However, in the case of **Central Michigan University Faculty Association v Central Michigan University**, (404 Mich 268; 1978), the Court reversed both MERC and the Court of Appeals to hold that criteria which related to evaluating faculty for reappointment and promotion were not within the educational sphere but were "other terms and conditions of employment" covered by PERA.

### **3. Autonomy of Local Governmental Units**

Various Sections of Article 7 of the state Constitution grant powers of home rule to counties, cities, and villages. These powers of local home rule are subject, however, to the Constitution and general law. Home rule is made manifest through adoption by local voters of a county or municipal charter. A charter delineates not only the powers and duties of a local governmental unit, but also restrictions imposed by the electors. A purpose of home rule is to provide electors of a charter unit with the flexibility to shape their local governmental structure as their needs require.

Labor relations and conditions of employment are of concern to local governments, in part because of the significant impact such matters can have on local fiscal and budgetary conditions. The constitutional right of home rule has on occasion conflicted with the constitutional authority of the Legislature to provide for the resolution of public sector employment disputes through statewide law. The state Supreme Court has decided in several cases that charter provisions and local acts otherwise lawful are subordinate to provisions of collective bargaining agreements negotiated under PERA. One effect of the judicial interpretation of PERA has been to allow the public sector collective bargaining process to override certain restrictions placed upon the scope of government by the local electorate.

**Residency.** A municipality may lawfully require that its employees reside within its corporate boundaries. An often-stated rationale advanced in support of such a requirement is that employees will take greater pride and interest in the community in which they work if it is where they live.

In **Detroit Police Officers Association v City of Detroit**, (391 Mich 44; 1974), the issue was whether the city's adoption by ordinance in 1968 of a provision that residency be a condition of continued employment removed the residency issue from the scope of mandatory subjects. The Court held that it did not.

While adoption of the ordinance by the city council was not an unfair labor practice -- the parties had bargained to impasse before the council took unilateral action -- residency was deemed to be covered by the definition "other terms and conditions of employment" contained in Section 15 of PERA. Therefore, the city's duty to bargain with respect to residency as a condition of continued employment, when the issue was raised in future negotiations, continued to exist.

**Retirement.** Retirement and pensions have been accorded detailed treatment by separate legislation in Michigan. Many local units of government have also addressed retirement matters by charter provisions or local acts. The statutes often establish pension plan contribution and benefit rates, as well as the method by which final average compensation is to be calculated. But the courts have also held that retirement is a mandatory subject of bargaining under PERA.

A second issue in the **Detroit Police officers Association (DPOA)** case involved a conflict between the city's authority to structure retirement for its employees and the Legislature's authority to require a city to bargain with its employees on the matter. The voters had, as allowed by the Home Rule Cities Act, Public Act 279 of 1909 as amended, incorporated the details of its retirement plan into the city charter. The charter could be amended only by a popular vote of the city's residents. The city argued that no change in retirement could be effected through collective bargaining without voter approval.

The Court, after rejecting the city's contention that retirement was not a mandatory subject of bargaining, stated the dilemma as follows:

If the positions of all parties were accepted, we would face direct conflict between that which the City contends the Legislature intended under the home rule cities act and that which MERC and the DPOA contend that the Legislature in-

tended under PERA and we would be required to determine which state statute should prevail and which would be impliedly repealed. (391 Mich at 65.)

The Court avoided this dilemma by holding that retirement plans were permissible charter provisions, i.e. that a city could, but need not, include such plans in its charter. Secondly the Court held that where a charter did provide for a retirement plan, the charter need contain no more than a general grant of authority "to implement and maintain a retirement plan. When the City placed the complete detail of its police retirement plan into the City Charter it went beyond the requirement of state law as set forth in the home rule cities act." (391 Mich at 66-67.) The Court held in effect that because substantive details with respect to retirement were not required in a charter, changes in the substance of such a retirement plan could be effected through collective bargaining in accordance with PERA without voter approval.

**Differential Benefits.** The state Attorney General held in March of 1986 that a limited portion of an employee group covered by a municipal pension plan could negotiate for itself a higher benefit level while maintaining the same contribution rate as that of the remainder of the group. The applicable statute, Public Act 345 of 1937 as amended, provides that pension plan members are to pay in five percent of their salary, and receive upon retirement benefits equal to two percent of final average compensation times the first 25 years of service, plus one percent of final average compensation times any years of service, or portion thereof, in excess of 25 years. The statute also provides that the municipality or the electors thereof may increase the benefit percentage for members of the plan to a maximum of 2.5 percent of final average compensation times the specified years of service.

The Attorney General held that one portion of the pension plan membership -- in this case, nonsupervisory firefighters -- could negotiate a higher benefit of 2.5 percent, while continuing to pay only 5 percent of their salary into the plan. State court precedent constrained the Attorney General to conclude that a township with a retirement system could "provide, pursuant to a collective bargaining agreement under PERA, an increase in the retirement benefit formula for a limited bargaining group containing less than all of the members covered by the system." (OAG March, 1986, No 6348 at 6.)

The Attorney General opinion, the conclusions of which were "mandated by court decisions interpreting PERA..." superseded two earlier opinions holding that differential benefit rates could not be established for public employees covered by the same system. Also superseded was an earlier opinion holding that "the statutory method of computing final average compensation could not be altered by the terms of a collective bargaining agreement." (OAG March, 1986, No 6348 at 6.) Police and firefighter pensions established under Public Act 345 of 1937 give rise to special concerns addressed in **Part III, D** below.

**Grievance and Disciplinary Procedures.** The case of **Pontiac Police Officers Association v City of Pontiac**, (397 Mich 674; 1976), concerned the issue whether a grievance policy was removed from the scope of mandatory subjects due to the existence of a civilian review board. The Pontiac charter provided for a civilian board to review police

misconduct charges. The board was empowered to impose discipline, including discharge when appropriate. As a result of the board's scope, the city refused to bargain with the union over a proposed grievance procedure.

The city argued that a "decision to require mandatory bargaining over such subject would \* \* \* abridge the power and authority of the electors' to frame, adopt and amend their charter and would therefore 'be in violation of the state constitution, specifically art 1, sec 7, and art 7, sec 22.1" (397 Michigan at 680.) The Court held that disciplinary procedures, including binding grievance arbitration, were mandatory subjects of bargaining. The Court also concluded that a civilian review board was a permissible charter provision, the existence of which did not alter the city's duty to bargain on the matter.

The holdings in the **DPOA** and **Pontiac Police officers Association** cases may be narrowly construed to mean only "that a public employer's collective bargaining obligation prevails over a, conflicting '**permissible** charter provision.'" **Pontiac Police officers Association v City of Pontiac**, (397 Mich at 683; emphasis supplied.) In neither case was the Court addressing a conflict between PERA and a **mandatory** charter provision. The mandatory provisions contained in Section 3 of the Home Rule Cities Act concern the basic structural arrangements of government with which a public sector union would generally not be concerned in a collective bargaining sense.

Secondly, the Court pointed out in the **Pontiac Police officers Association** case "[t]hat the city has not shown that the duty to bargain in good faith regarding grievance procedures has frustrated the exercise of its constitutional powers." (397 Mich at 683.) That the result reached would have been different, had the city proven the exercise of its constitutional powers of home rule were being frustrated, may be implied from the Court's language but is by no means certain.

**Minimum Staffing.** The matters addressed heretofore have involved contentions of public employers that certain topics were outside the scope of PERA. Court precedent in this area has the potential, however, for application to public unions as well.

A number of public unions in Michigan, particularly unions representing firefighters, have recently sought minimum staffing levels, either through collective bargaining or by voter approval. The rationale for submission of a minimum staffing proposal to the voters may be either that a union is unsuccessful at achieving the desired result through collective bargaining or the feeling that an ordinance or charter amendment will provide more permanence than a collective bargaining contract, the terms of which expire as of a given date. The electors of several Michigan cities have approved such proposals, but the Home Rule Cities Act does not require that a charter contain provisions on minimum staffing.

While Section 15 of PERA imposes upon public employers the duty to bargain, the section clearly defines collective bargaining to be "the **mutual** obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith..." on mandatory subjects of bargaining. (Emphasis supplied.) A state court has held that the question of manpower levels, as it relates to

safety, is a mandatory subject of bargaining. **City of Alpena v Alpena Firefighters Association**, (56 Mich App 568; 1974).

It has repeatedly been held that the duty to bargain upon a matter, once it is classified as a mandatory subject, cannot be defeated by operation of a local ordinance or permissible charter provision. As the Court noted in the **DPOA** case, "[t]he enactment of an ordinance, however, despite its validity and compelling purpose, cannot remove the duty to bargain under PERA if the subject of the ordinance concerns the 'wages, hours or other terms and conditions of employment' of public employees." (391 Mich at 58.) The precise point has not been ruled upon. It seems logical, however, that the presence of an ordinance or charter provision specifying minimum staffing would no more relieve a public union of its duty to bargain upon the matter -- if subsequently raised by the employer -- than the adoption of a residency ordinance by a municipality would relieve an employer of the duty to bargain upon the matter of residency in subsequent negotiations.

#### 4. Teacher Tenure

Public school teachers have fared no better than public employers in attempting to carve out exemptions from the scope of PERA. **Rockwell v Crestwood School District Board of Education**, (393 Mich 616; 1975), concerned the question whether the discharge of a tenured teacher was governed by PERA or by Public Act 4 of 1937 (ex session) as amended, the Teachers' Tenure Act.

Section 6 of PERA provides for a hearing, upon request, within 10 days after a discharge for striking, while the Teachers' Tenure Act requires a hearing **before** discharge. The Court held PERA to govern, partly on grounds of judicial precedent and partly because Section 6 states that with respect to discipline for strike activity, it shall govern "[n]otwithstanding the provisions of any other law."

#### 5. The Judiciary

Notwithstanding their interpretations granting dominance to PERA in other situations, the courts have been more circumspect in applying its provisions to the judicial branch.

**Application of PERA to Lower Courts.** In the case of **Judges of the 74th Judicial District v Bay County**, (385 Mich 710; 1971), a union had in 1968 negotiated a union-shop agreement with the county board of commissioners. In 1970, the union sought recognition as the exclusive bargaining agent for employees of the 74th District. The union also filed a grievance claiming that the presiding judge had violated the collective bargaining agreement with the county by instructing his secretary not to join the union.

The District Court judges then filed suit, seeking a declaratory judgment that their employees were not county employees and were not covered by the county's collective bargaining agreement, and seeking to enjoin MERC from determining whether the court had committed an unfair labor practice. The state Supreme Court held that the District Court was the public employer for its employees. The predicate upon which the holding rested was statutory in nature. Since the court statutorily hired its employees and determined their compensation within the limits of the amount appropriated, it was viewed as the employer.

Public Act 154 of 1968, the district court act, requires the district control unit -- that unit of government responsible for maintaining, financing, and operating the District Court -- to appropriate a lump sum to the court. The District Court is given discretion to spend its appropriation as it sees fit, unencumbered by line-item restrictions. Secondly, the Supreme Court held that the terms of PERA were applicable to the district court's employees because it "is apparent that [PERA], based on art 4, sec 48 of the Michigan Constitution does not encroach upon the constitutional and inherent powers of the judiciary and, therefore, under the philosophy of judicial restraint this Court accedes to the jurisdiction of the Michigan Employment Relations Commission established in that act." (385 Mich at 729.) **Livingston County v Livingston Circuit Judge**, (393 Mich 265; 1975), extended PERA to employees of the probate and circuit courts.

In the case of **Council No 23, Local 1905 American Federation of State, County & Municipal Employees v Recorder's Court Judges**, (399 Mich 1; 1976), the Court held a collective bargaining agreement **did not** control the discharge of a probation officer. The collective bargaining agreement provided for binding grievance arbitration with respect to all disciplinary matters. The probation officer was terminated in accordance with a probation officer removal statute and the Recorder's Court refused to abide by the grievance procedure.

The Supreme Court held that the statute governing removal of probation officers prevailed because, as compared with PERA, it was the more specific of the two statutes. The decision ignored previous cases which had held that PERA prevails over conflicting legislation, charters, and ordinances. Secondly, as the dissent aptly noted, the statutes involved in the **Wayne County Civil Service Commission** and **Crestwood** cases were also more specific than PERA, but in each of those cases the Court had held that those statutes were superseded by PERA.

The result reached appears to have been guided less by the law than by the policy decision that to require the Recorder's Court to engage in binding grievance arbitration would interfere with the independence of the judiciary. In fact, the Recorder's Court had advanced this argument to justify its refusal to submit to arbitration. As the Supreme Court noted, "[s]ubmission of [the decision to remove a probation officer] to a grievance procedure with binding arbitration could result in a reinstatement of a probation officer in which the court could no longer place trust or confidence." (399 Mich at 7.)

There is of course no reason to believe that a court's burden in such an instance would be greater than that imposed upon any other employer required by a grievance arbitrator to reinstate a discharged employee. More importantly, the Court failed to note that the Recorder's Court had been under no obligation to sign an agreement providing for binding grievance arbitration. The courts have been at pains to point out that PERA requires only good faith bargaining, but imposes no corresponding duty to arrive at an agreement, nor dictates the precise terms of an agreement.

**Application of PERA to the Supreme Court.** In the case of **in the Matter of the Petition for a Representation Election Among Supreme Court Staff Employees**, (406 Mich 647; 1979), a union sought to represent such Court employees as custodians, technicians, and secretaries. MERC, at the request of the Court, considered the question whether it

could exercise jurisdiction over the Supreme Court without violating the separation of powers provision contained in Section 2 of Article 3 of the state Constitution. Section 2 of Article 3 states that "[t]he powers of government are divided into three branches; legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

MERC had summarily dealt with the separation of powers concern by observing that "clerical employees do not exercise the powers of one branch of government or another." (406 Mich at 662.) The Court disagreed. The Court did not conclude that its employees were not public employees covered by PERA. Rather, the Court held that MERC as an executive-branch agency had no authority to exercise jurisdiction over the Supreme Court.

As noted, the separation of powers provision of Section 2 of Article 3 prohibits any branch from exercising powers granted to either of the other branches "except as expressly provided in this constitution." Section 48 of Article 4 from which PERA derives might have been properly construed as an express exception to the separation of powers, thus avoiding the larger constitutional question. This resolution would not, however, have dealt with the practical difficulty of the Court's right of appeal from a MERC decision with which the Court disagreed. The Court noted that as a

further incidental indication of how far out of the order of things it is to have MERC holding court over the Supreme Court, an appeal from the order of MERC is to the Court of Appeals. If MERC has jurisdiction to determine cases with the Supreme Court as a party, then the Supreme Court might be in a position to appeal from the decision of MERC to the Court of Appeals, which again is an inferior tribunal to the Supreme Court. In short, MERC assuming jurisdiction over the Supreme Court puts everything upside-down. (406 Mich at 663.)

The reasoning of the Court was somewhat facile. There was no indication that MERC was attempting to displace the Supreme Court by exercising powers properly belonging to the judiciary. The commission was simply attempting to carry out the responsibility given to it by the Legislature to administer the state's collective bargaining laws. The Court had previously admitted as much in the **Bay County District Judges** case by holding that it was "apparent that [PERA], based on art 4, sec 48 of the Michigan Constitution does not encroach upon the constitutional and inherent powers of the judiciary and, therefore, under the philosophy of judicial restraint this Court accedes to the jurisdiction of the Michigan Employment Relations Commission established in that act." (385 Mich at 729.)

Secondly, as with the result reached in the **Recorder's Court** case, the result in the **Supreme Court Staff Employees** case was inconsistent with prior decisions of the Court interpreting PERA. As noted above, the Court had held in the **Eastern Michigan University** case that public employment applied to employment or service in **all** governmental activity, whether carried on by the state or by townships, cities, counties, commissions, boards or **other governmental instrumentalities.**" (384 Mich at 566; emphasis supplied.)

Finally, accepting the Court's reasoning at face value would, as the dissenting opinions noted, call into question the operation of administrative agencies which on occasion act in a quasi-judicial capacity. A dissenting opinion in the principal case noted that to "hold (as did the majority] would mean, for example, that a Supreme Court employee who suffers a work-related injury could not obtain a Worker's Compensation Appeal Board determination if the Court objected to the WCAB taking 'jurisdiction' of the employee's claim against the Court." (406 Mich at 688, footnote 2.)

## **Part II. The Relationship of PERA to Compulsory Arbitration**

The direction which the courts have taken in construing the relationship of PERA to other laws takes on added significance when compulsory arbitration is considered. The Michigan Legislature in 1969 adopted compulsory interest arbitration for municipal police and firefighter personnel.<sup>\*</sup> The scope of the statute was later broadened to include emergency medical service and telephone operator personnel employed by a municipal police or fire department.

Section 14 of the arbitration statute, Public Act 312 of 1969 as amended, states that the act is supplementary to PERA. Because Act 312 supplements PERA, mandatory subjects of bargaining under PERA are, with respect to municipal police and firefighter personnel, the same matters which may be submitted by either party to compulsory arbitration. This fact may account for the absence from Act 312 of any enumeration of the types of issues that may be submitted to arbitration. The procedural aspects of compulsory arbitration differ from those of collective bargaining, however, in several important respects.

It will be recalled that under PERA bargaining upon a mandatory subject must proceed either to agreement or impasse. Should impasse be reached, and alternatives exhausted, unilateral action is permitted provided it is consistent with the last offer of settlement. Under the arbitration statute a matter may be submitted to arbitration if not satisfactorily resolved after 30 days of mediation. There is no requirement contained in Act 312, however, that the parties negotiate to impasse before proceeding to mediation.

Secondly, even were parties required to negotiate to impasse before invoking mediation on the way to arbitration, the presence of Act 312 would preclude unilateral action on the part of a public employer. This preclusion was not unintended. One purpose of Act 312 was to prevent unilateral action against police or firefighter personnel during contract negotiation, the result of which might be to disrupt service and endanger the public safety.

The most prominent consequence resulting from the supplementation of PERA by the arbitration statute has to do with the compulsory nature of the Act 312 process. Courts, in holding that PERA is the predominant state statute governing public employment in Michigan, have made much of the fact that the statute requires good faith bargaining but not agreement. The public employer in other words retains its flexibility to disagree despite the obligation to bargain. It may be said

---

<sup>\*</sup>Those who desire a more detailed treatment of Act 312 should refer to Citizens Research Council Report No. 279, entitled "Compulsory Arbitration in Michigan," (January 1986).

then that the public employers in the **DPOA, Pontiac Police officers Association, Eastern Michigan University** and the **University of Michigan** cases were under no obligation to agree to any provision inconsistent with any law or ordinance.

With respect to Act 312, however, the arbitrator has the authority to impose an agreement. In the case of **Local 1277, Metropolitan Council, No 23, AFSCH, AFL-CIO v City of Center Line**, (414 Mich 642; 1982), the Court examined the interplay of the two statutes and found that "[g]iven the fact that Act 312 complements PERA and that under Section 15 of PERA the duty to bargain only extends to mandatory subjects, we conclude that the arbitration panel can only compel agreement as to mandatory subjects." (414 Mich at 654.)

The operative word from the above quoted language of course is "compel." An arbitrator, acting pursuant to Act 312, may impose an agreement which conflicts with some existing charter provision or ordinance, even though one of the Act 312 criteria which an arbitrator must consider is the lawful authority of an employer. The state Attorney General noted this fact with respect to a local government pension matter:

Since 1969 PA 312, supra, sec 8 requires arbitrators to 'adopt the last offer of settlement which... more nearly complies with the applicable factors prescribed by section 91 as to each economic issue, arbitrators are required to choose between the last offer of settlement proposed by the respective parties. Thus, if the last offers of the respective parties regarding pension and retirement provisions conflict with the retirement board's classifications, the 1969 PA 312 arbitration panel **must order** contractual provisions which conflict with those classifications. (OAG 1983-84, No 6244 at 368; emphasis supplied.)

The **Center Line** case noted that an employer cannot be required to bargain over certain matters of policy. In the **Center Line** case, an arbitrator's award contained a provision that required layoffs of police officers, when due to a lack of funds, to be accompanied by layoffs in other city departments. The arbitrator had classified layoffs as a noneconomic issue, rejected the final offers of both the city and the union, and fashioned his own remedy.

The Court concluded the provision exceeded the arbitrator's authority because it did not concern a mandatory subject of bargaining. Nor was the provision justified as a safety measure, since police officer layoffs were not prohibited, but only required to be accompanied by layoffs of other employees. This distinguished the case from **Alpena Firefighters Association**, (56 Mich App 568; 1974), which had held that safety falls within "other terms and conditions of employment."

Whether an insufficiency of funds required layoffs, and if so in what department, was a management prerogative of the city. Once the decision was made, however, the city could be made to bargain with a union whose members would be affected by the layoffs, to determine the basis on which the layoffs might occur. The result reached was consistent with that of federal decisions holding that an employer is not required to bargain over a decision, but can be required to bargain about the **effects** of the decision once made.

### **Part III. Alternative Approaches**

#### **A. General Considerations**

As the policymaking body of Michigan state government, the Legislature might wish to make explicit its policy with respect to public sector collective bargaining and to directly resolve conflicts involving PERA, Act 312, and other laws. A legislative policy on public sector collective bargaining could be approached from several points. Before examining particular alternatives, it is appropriate to inquire why anything need be done about the matters examined above.

The state Constitution authorizes the Legislature to resolve public sector employment disputes, and the Legislature chose to exercise that authority by introducing collective bargaining into the public sector. Since its introduction, the process has not always functioned smoothly. Collective bargaining in concept, however, has not proven to be inherently incompatible with the nature of government as many labor relations academicians had thought. Difficulties have arisen in large part from superimposing on the public sector a process which developed in the private sector. These difficulties notwithstanding, it cannot seriously be contended that public sector collective bargaining has not been salutary in many respects. No suggestion is made that appropriate gains made through collective bargaining be rolled back.

PERA may indeed be the public policy of Michigan with respect to public sector collective bargaining, but PERA must be made to function in harmony with other public policies which find their origins in the same Constitution. It matters not at all whether such other public policies be denominated autonomy for educational institutions, home rule, or limitations upon the burden of taxation; if they derive from the Constitution, they are to be respected until such time as the voters alter or abolish them. The people of Michigan in 1963 did not ratify a collective bargaining agreement: they approved a Constitution, only one provision of which authorizes the Legislature to resolve public sector employment disputes. Clear legislative guidance is needed if the conflicts between the various competing constitutional and statutory policies are to be resolved in harmonious fashion.

The need for such resolution commends the matter to thoughtful consideration by citizens and public officials alike because the basic structure of the government established by the voters is involved. It is true that in a republican form of government, as exists in every state of this country, the people do not directly govern, but rather periodically elect those who are to govern. But it is likewise true that citizens must maintain a vigilant and abiding interest in their government if the institutions which they crafted are to function as they intended. There are several broad approaches.

#### **B. Existing Court Precedent Could Be Codified by the Legislature**

At one end of the spectrum, the Legislature could accept existing court precedent with respect to PERA, but amend the statute to make its dominance explicit, if that be the legislative intent. Legislative intent is at best illusive of determination "when there is no evidentiary or other reasonably authoritative guide to pertinent meaning or purpose of the legislators." **Wayne County Civil Service Com-**

**mission v Board of Supervisors**, (384 Mich 363, 367; 1971). When the Legislature enacted PERA, it apparently did not contemplate that a conflict might arise with other statutes.

The courts have dealt with this conflict by holding that the Legislature intended PERA to predominate. As noted above, however, Section 6 of PERA applies "[n]otwithstanding the provisions of any other law," indicating a Legislative intent that specifically Section 6 should prevail over conflicting statutes. The Court admitted as much in the **Crestwood** case when it stated that "[t]he legislature, recognizing the diversity of legislation concerning public employees, provided in **section 6** a specific, unitary procedure for the discipline of public employees who strike superseding the diverse procedures applicable to different public employees where the basis for discipline is a ground other than striking." (393 Mich at 628; emphasis supplied.)

It is a basic rule of statutory construction that every word of a statute is to be accorded some meaning. Yet, had the Legislature intended the **entire** statute to supersede other statutes with which it would conflict, the initial clause of Section 6 would have been mere surplusage.

The Supreme Court reached the opposite conclusion when first called upon in 1971 to construe PERA in the **Wayne County Civil Service Commission** case. That decision, once made, became as important a reason for reaching the same result in subsequent cases as did legislative intent. The self-imposed doctrine of **stare decisis** generally operates to preclude a court of last resort from overruling a long line of precedent.

The Legislature has acquiesced in the face of this judicial interpretation. Nevertheless, the fact remains that "[t]he public policy of this state as to labor relations in public employment is for **legislative** determination." **Board of Control of Eastern Michigan University v Labor Mediation Board**, (384 Mich at 566; emphasis supplied.) The Legislature could amend PERA to make its dominance explicit. This could be accomplished by a simple amendatory statement that the entire statute, and not just a particular section of it, is to prevail notwithstanding the provisions of any other law. Several other states have gone in this direction. Connecticut and Hawaii have enacted collective bargaining statutes which predominate over conflicting state or local laws due to an explicit legislative statement to that effect.

**Connecticut.** Subsection (f) of Section 7-474, which deals with municipal employees, states that when

there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of sections 7-467 to 7-477, inclusive, on matters appropriate to collective bargaining, as defined in said sections and any charter, special act, ordinance, rules or regulations adopted by the municipal employer... the terms of such agreement shall prevail. General Statutes Annotated, Title 7.

**Hawaii.** Section 89-19 of chapter 89, dealing with collective bargaining in public employment, states that the

chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof including the department of personnel services or the civil service commission.

### **C. The Legislature Could Specifically Define the Scope of Bargaining**

It was noted above that the Legislature enacted in Section 15 of PERA language virtually identical to that found in Section 8(d) of the National Labor Relations Act. State courts, in construing the duty to bargain and the categorization of subject matter, have borrowed heavily from the method used by federal courts in construing the National Labor Relations Act. The method employed by federal courts has been a case by case adjudication. The National Labor Relations Act presents an imperfect model, however, from which to fashion a state statute such as PERA. The National Labor Relations Act as already noted governs private, not public sector, employment relations. The two sectors may properly be viewed as fundamentally different.

The philosophic foundation upon which the National Labor Relations Act was built was the equalization of bargaining power between private parties -- employer and employee -- each of whom was seeking to improve his or her private economic position. This foundation was clearly stated in the "findings and policies" set forth by Congress in Section 1 of the act. The view had emerged by 1935, the year in which the National Labor Relations Act was enacted, that workers would not be taken seriously unless placed on an equal footing with their employers. Industrial strife would occur, the result of which would be economic waste and a burden on commerce. The avoidance of industrial strife was the desired end: collective bargaining but a means by which it might be achieved.

While this concept of the public interest justified passage of the National Labor Relations Act, the fact remains that the employment relationship to be regulated was one between private parties. Case by case adjudication is an appropriate part of such a framework because it permits a balance to be maintained between private parties seeking to improve their respective private economic positions.

There exists no parallel economic component in the public sector. A unit of government does not exist to earn a profit, but rather to provide services, many of which may be mandated by law. Nor is the employment relationship between private parties. Notwithstanding the technical difficulty which arises in the public sector of ascertaining who the "employer" is, practically speaking the people who comprise the unit of government and pay the taxes to support it constitute the employer. It has been the traditional view that a strict equalization of bargaining power in the public sector is inappropriate because the ultimate employer is sovereign.

The differences between the public and private sectors with respect to the employment relationship provide a rational basis for a state legislature to especially define the scope of bargaining in the public sector. The categorization of subject matter as mandatory, permissive or illegal need not be abandoned. However, the Legislature could de-

fine by statute what subjects comprise any or all of these three categories.

**Definition of Mandatory Subjects.** The Legislature could amend PERA to specifically define those matters upon which bargaining must occur. To date, this particular category, as defined by the courts, contains the vast majority of subject matter because almost anything imaginable can be made to fit within the phrase "wages, hours, and other terms and conditions of employment." It may be that the category of mandatory subjects with respect to the public sector deserves less expansive treatment than it has heretofore been accorded by the courts.

**Definition of Permissive Subjects.** The legislature could amend PERA to define those matters upon which bargaining may but need not occur. Pennsylvania has followed such an approach.

**Pennsylvania.** Section 702 of the Pennsylvania Public Employment Relations Act states that

public employers shall not be required to bargain over matters of inherent management policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the employer, standards of service, its overall budget, utilization of technology, the organization structure and selection and direction of personnel.

The Pennsylvania Legislature passed an act in 1974 which in effect excluded state employee pension rights from collective bargaining. The statute provided that such pension rights were to be determined solely by the statute, and could not be altered by the terms of a collective bargaining agreement. Section 702 was repealed to the extent of any inconsistency.

**Definition of Illegal Subjects.** The Legislature could amend PERA to define those matters which are of such paramount public importance that they should be outside the scope of bargaining altogether. Hawaii has followed this approach.

**Hawaii.** Section 89-9(d) of chapter 89, dealing with collective bargaining in public employment, prohibits collective bargaining with respect to

matters of classification and reclassification, benefits but not contributions to the Hawaii public employees health fund, retirement benefits, and the salary ranges and number of incremental and longevity steps now provided by law....

The wages to be paid with respect to each range are negotiable, however, as is the length of service necessary to trigger incremental and longevity steps.

**D. PERA Could Be Made to Complement, but not Supersede  
More Specific Charter Provisions or Statutes**

PERA might also be modified so that it would control only when the Legislature or the people have not specifically addressed a subject matter

through separate legislation. This alternative would accomplish much the same result as specifically defining the scope of bargaining.

Retirement is an example of an area which, in Michigan, has been accorded treatment by separate legislation, even though it has been held to be a mandatory subject of bargaining under PERA. Contributions to and benefits from retirement plans are often statutorily established. It is far from clear that the Legislature intended these statutory provisions to be undone in piecemeal fashion by a patchwork of collective bargaining.

Nor is it clear that a charter provision, one purpose of which is to define the scope of home rule authority, should be so easily altered as was done in the **DPOA** and **Pontiac Police officers Association** cases. One of the tenets of home rule is that the electors of a charter unit be accorded the flexibility to shape their local government structure as their needs require, subject of course to the Constitution or general law. In both the **DPOA** and **Pontiac Police Officers Association** cases, the electors placed certain provisions into their charters, presumably because the electors thought them prudent, even though not required to do so by the Home Rule Cities Act. It is no answer to denominate such provisions as permissible rather than mandatory, and to conclude that they need not have been in a charter at all.

A salient argument can be advanced that the setting aside by collective bargaining agreement of voter approved charter provisions should be avoided. Collective bargaining agreements by their very nature are generally negotiated behind closed doors, thus permitting the public little, if any, opportunity for input. While it is true that the public should be represented through the officials conducting the negotiations, the interests of a public employer may not always be in step with the interests of the public. This may particularly be the case with respect to pensions established under Public Act 345 of 1937.

The Attorney General, as noted above, recently held that one portion of the membership covered by an Act 345 pension plan can negotiate a higher benefit while continuing to pay the same percent of their salary into the plan. The level of benefits to be paid out of a retirement plan have a direct bearing upon its actuarial soundness.

Governmental units which adopt a police and firefighter pension under Act 345 are required, on a periodic basis, to make appropriations to the retirement fund in an amount sufficient to maintain actuarially determined reserves. Subsection (2) of Section 9 of the act states that amounts required by taxation to meet these appropriations fall outside of any tax limits imposed by charter provisions or state law. A tax increase to fund a collectively bargained, Act 345 benefit increase may be more palatable to public employers because such a tax, by falling outside of tax limits, need not disrupt established municipal priorities. In such cases, collective bargaining directly determines a portion of a municipality's tax rate, and without voter approval.

The collective bargaining laws of several other states specifically exclude from the scope of collective bargaining conditions of employment dealt with by a valid municipal ordinance.

**California.** Section 3500 of the California general government title, dealing with local public employee organizations, states that

nothing contained herein shall be deemed to supersede the provisions of existing state law and charters, ordinances, and rules of local

**Pennsylvania.** Section 703 of the Pennsylvania Public Employment Relations Act states that parties to a collective bargaining agreement

shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters. 43 Statutes Annotated, sec. 1101.703.

The scope of Section 703 has been limited, however, by the Pennsylvania Supreme Court. The Court has held that the section excludes only those matters as to which "other applicable statutory provisions explicitly and definitively prohibit the public employer from making an agreement...." **Pennsylvania Labor Relations Board v State College Area School District**, (461 PA 494, 510; 1975).

**Washington.** Washington's Public Employment Relations Act is set forth at chapter 41.56 of the revised code of Washington (RCW). Section 100 of the chapter provides for the authority and duty of public employers to engage in collective bargaining. That section also provides that nothing

contained herein shall require any public employer to bargain collectively with any representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW.

**E. Act 312 Could Be Made to Complement, but not Supersede More Specific Charter Provisions or Statutes**

The reasons which justify a modification of PERA so as to limit the scope of bargaining, or so that it would not control when the Legislature or the people have specifically addressed a subject matter through separate legislation, apply with greater force to Act 312. As with collective bargaining agreements, arbitration proceedings do not readily permit public access. Secondly, the statutory obligation with respect to Act 312 is not satisfied by bargaining to impasse without reaching agreement. An arbitrator will ultimately impose an award.

While Act 312 is supplementary to PERA, it need not follow that every topic which is a mandatory subject of bargaining under PERA should automatically be one upon which an arbitrator can impose an award. Act 312 could be modified to include an enumeration of the topics to which it should extend, rather than simply relying upon the mandatory subject matter of Section 15 of PERA that has been developed through case by case adjudication.