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A MACKINAC CENTER POLICY BRIEF

# Reconsidering Michigan's Public Employment Relations Act

## RESTORING BALANCE TO PUBLIC-SECTOR LABOR RELATIONS

PAUL KERSEY

MACKINAC CENTER
FOR PUBLIC POLICY

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## Restoring Balance To Public-Sector Labor Relations

by Paul Kersey

Mackinac Center for Public Policy

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## INTRODUCTION: PROBLEMS AND PREMISES

This study is a sequel to the Mackinac Center Policy Brief "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences."[1] In that study, we considered the state law that governs labor relations between local governments and their unionized employees.* To a lesser extent, we also discussed the Civil Service Commission rules that govern relations between the state and its employees. Both PERA and the CSC rules were based on the National Labor Relations Act, a federal law designed to cover private-sector workers. We found that PERA has a deleterious effect on Michigan's government and economy for several reasons:

- The National Labor Relations Act was an especially poor model for public-sector labor relations.
- PERA empowered union officials, but failed to establish any means of holding them accountable to the public for the manner in which they used that power.
- PERA gave union officials something akin to a veto power over important aspects of local policymaking.
- Agency-fee clauses† in local collective bargaining agreements were in effect a taxpayer subsidy of union lobbying

Since the release of that report, Michigan's economic condition has improved only marginally, but a new Legislature has been seated, and a new administration, pledging a fresh approach to state government, has just entered office. Government employees ultimately are responsible for implementing new laws and new policies, so a new approach to governing suggests a new approach to hiring, supervising and compensating those employees. No area of public policy in Michigan is more in need of fresh thinking than the relationship between government and the men and women who work for it. A new commitment to performance, efficiency and accountability in government demands a new labor law for government employees.

This report will consider differing approaches to public-sector labor law reform, ranging from the modest to the comprehensive. It is a truism that we want government employees to be treated fairly and that it is best if those employees

* The Michigan Public Employment Relations Act was passed as Public Act 379 of 1965; see MCL § 423.201-217. It has been amended several times since.

† Agency-fee clauses in union contracts require employees to pay fees to the union for its work as a collective bargaining representative even if the employee does not wish to join the union. In the vast majority of cases, the union demands such fees, and management agrees to them.

are satisfied with their wages and working conditions. But public employees are not the only ones with an interest in government labor relations. Our discussion will be based on two very basic premises that have been overlooked far too often in debates involving government employees:

- First, that government in Michigan, in all its programs and aspects, is accountable to the people for its actions and should function in accordance with the will of the people. Government employees are only one of many constituencies that government must attend to and should not be given any unique powers that elevate their interests above those of other citizens.
- Second, that collective bargaining, while potentially valuable to workers of all stripes, is not an inalienable right. To the extent that it is allowed in government, it must be conducted under rules that protect the public interest. If collective bargaining cannot be brought into harmony with the public interest, it ought not to be practiced in government at all.

This second premise is likely to generate controversy and vehement denials among union officials, yet it is a natural and unavoidable consequence of consensual government, and it has been expressly validated by U.S. Supreme Court precedent.[2] If government exists to advance public interests — however broadly or narrowly defined — then the law ought not to enshrine any procedure that detracts from the public interest.

Public employees will always have the right to join an organization that seeks to advance their well-being. That organization may style itself as a union, but government is under no constitutional obligation to bargain with that union and ought not bargain with a union if this does not serve the public interest. Furthermore, because the government and its employees are servants of the public, it is the public, not the officials of government employee unions, who must determine what the public interest is and whether collective bargaining serves it well.

## THE PRICE OF PERA

As we demonstrated in our prior Policy Brief on this subject, it is manifestly clear that PERA in its current form has done considerable harm to the state of Michigan. Under PERA, school employee unions have become powerful enough to successfully lobby the state Legislature for costly retirement benefits that may now exceed taxpayers' ability to pay. At the end of fiscal 2009, the state's

school employee pension plan carried an unfunded liability of $12.0 billion, and the projected unfunded cost of providing retiree medical benefits if they are not modified totaled a whopping $16.8 billion to $27.6 billion, depending on the actuarial assumptions.[3] Conservatively, these unfunded retirement benefits amount to more than $2,870 for every Michigan resident. This sum will have to be made up in taxes or in reduced government services if the state maintains its current agreements.* While much of the unfunded pension liability is due to poor market returns in recent years, the fundamental problem lies in the state's agreement to provide defined retirement benefits of a kind that the private sector has increasingly abandoned precisely because of the risk and cost involved.[4]

The Michigan Education Association, the state's largest public school employee union, has also used its powers under PERA to manipulate a majority of school districts in the state into buying extremely expensive health care insurance plans through the Michigan Education Special Services Association, a single institution favored by the union.† By moving public school employees away from these and similar plans and into health savings accounts and catastrophic care insurance plans,‡ state taxpayers could have saved an estimated $451 million in 2009 and $26 billion between then and 2021.[5] The MEA has further used PERA to prevent the institution of teacher merit pay that research suggests could do much to improve the quality of public schools.[6]

Because working conditions and disciplinary policies are subject to bargaining and grievances, collective bargaining agreements required by PERA complicate the essential government task of directing and disciplining law enforcement officers.[7] PERA has also largely insulated government employees from the compensation reductions and layoffs suffered by many private-sector workers, serving to further increase the burden on families and employers in the midst of a recession.[8] Agency-fee clauses allowed by PERA have turned government employee unions into a disproportionately powerful political force in the state.[9]

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* The accrued pension benefits are guaranteed under the Michigan Constitution. Hence, the pension liabilities must be paid unless the constitution is amended. The retiree medical benefits, in contrast, are not protected by the state constitution and can be reduced (or increased) by an act of the Michigan Legislature. See Richard Dreyfuss, "Michigan's Public-Employee Retirement Benefits: Benchmarking and Managing Benefits and Costs" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/13862 (accessed Feb. 10, 2011).

† The Legislature has attempted to address this problem by prohibiting collective bargaining over the policy holder of school employee health care benefits. See MCL 423.215(3)(a). This reform was meant to free school districts to choose among more health care insurance providers, but for a variety of reasons, the reform has not proved particularly effective.

‡ A health savings account, commonly known as an HSA, is a tax-advantaged account in which employees and their employers can place money to save for routine health expenses. The accounts are usually set up in tandem with a lower-cost, high-deductible "catastrophic care" health insurance plan to cover large, unpredictable health care expenses.

The public interest lies in a government that provides essential services in a fair and efficient manner. PERA has created a union movement that has both the muscle and the motive to fashion a government that too often provides services poorly and presents an oversized burden on families and businesses.[10] Moreover, it has tilted the political process to protect government employees above all other interest groups. At a minimum, PERA is in desperate need of revisions that will bring collective bargaining in line with the public interest. Failing that, it is collective bargaining, not the public interest, that must go by the wayside.

## Coping With PERA: The Oakland County Model

In theory, it should be possible for government to function efficiently while bargaining collectively with its employees. If PERA has a saving grace, it is that in the event of a bargaining impasse, the local government employer may implement its last, best offer. Before reaching this point, however, the employer must be prepared to demonstrate to the state that it has been bargaining in good faith throughout. It may also need to be prepared for the nonbinding procedures of mediation and fact-finding.[11] In the end, though, it is legally possible for local officials to take firm positions on matters that affect public interests.

But for this to occur, the scope of bargaining needs to be fairly narrow, so that collective bargaining has a minimal effect on taxing, spending and basic government operations. Union political influence would also need to be constrained to ensure that management's bargainers are effective representatives of the community at large.

One local government has managed to achieve something approximating this state of collective bargaining nirvana: Oakland County.[12] The county's experience is extremely atypical for local governments in Michigan, however, and as we will see, it will be extremely difficult for other localities to fully implement Oakland's methods.

Oakland County's approach to collective bargaining is less a matter of technique than of mindset. Since PERA took effect, Oakland County has refused to be drawn into the typical union-versus-management framework that typifies labor relations in most other jurisdictions. Instead, it has dealt with unions in a fair but firm manner that has reduced conflicts but also has limited opportunities for union officials to exploit taxpayers.

In a legal environment where bargaining is explicitly required, employers are tempted to approach bargaining sessions with a defensive posture, take an extremely tough opening position, then make concessions that will presumably be

matched by union concessions until union and management meet in the middle at an agreement that one hopes will be fair and affordable. The problem with this approach is that the course of bargaining remains fluid, and that all subjects — not just hours, wages and benefits, but also working conditions that affect government operations — are open to negotiation and manipulation.

According to Oakland County Director of Labor Relations Tom Eaton, the county's approach is to determine its budget and its pay and benefit package for nonrepresented employees first. Oakland County also turns to its Human Resources Department to establish work classifications and standards. It then uses its pay package for nonrepresented employees as the basis for bargaining with unionized workers.[13] Because the package extended to nonrepresented workers must be competitive with the private sector in order to retain employees, the corresponding initial offer to unionized workers is likely to be reasonably attractive as well, but from there, the county's position is fairly firm.[14] The county is willing to make changes, but the union needs to be able to show the reasons behind its positions, and the reasoning has to be the sort that would be persuasive to both elected officials and the public at large. The bargaining team strives to ensure that the interests of taxpayers are not forgotten. The bargainers' interest in getting a deal done takes a back seat to the concerns of the general public. As Eaton puts it: "Give us a reason. We have people to convince."[15]

The other key to Oakland County's approach is that the county's budget is largely set prior to collective bargaining — tax rates and spending needs are determined outside of collective bargaining, and the contract is framed to fit those, rather than the other way around. This element is critical for maintaining the county's fiscal condition. "It's where you put the cart in relation to the horse," says Eaton, who is the county's lead labor negotiator. "The budget sets the parameters for bargaining."[16]

This "best offer up front" approach to bargaining can generate controversy and requires some legal and diplomatic skill to pull off. PERA's good-faith bargaining standards are premised upon give-and-take at the bargaining table. While neither union nor management is required to make any particular concessions as bargaining continues, PERA does put pressure on both sides to make compromises as talks go on, if only for the sake of appearances. When an employer makes its best offer up front, it limits its own ability to make tactical concessions.

If done skillfully, however, this approach yields substantial benefits: It limits the overall range of bargaining, increasing the likelihood that the final contract will

be consistent with the county's overall policies. The method also improves the county's standing among its own employees. When an employer stakes out a tough opening position for purely tactical reasons, employees may be misled into thinking that the employer's opening demands are more serious than they actually are. Opening with one's best offer gives employees a more realistic sense of the employer's goals and reduces the risk that union officials will use the employer's initial offer to build resentment against management.

Oakland County's approach to collective bargaining tends to lower the stakes in bargaining itself. This limits the influence of union officials, but is not necessarily detrimental to government employees. As Eaton puts it: "Would you rather we be honest and upfront, or would you rather we lowball you?" In collective bargaining, honesty combined with smart planning is the best policy.

Another noteworthy feature of Oakland County's collective bargaining agreements is the general absence of "agency fees." The overwhelming majority of collective bargaining agreements feature agency-fee clauses stating that all workers covered by the agreement must pay union dues or fees regardless of their support or opposition to the union. Agency fees effectively guarantee unions a permanent flow of money. Oakland County, however, has only one agency-fee contract.[17] That contract covers deputy sheriffs, who are unique in having access to binding arbitration in the event of a bargaining impasse.

The county is also noteworthy for having established a "defined-contribution" pension plan for all county employees hired after June 1994.*[18] Defined-contribution plans are far less risky than traditional defined-benefit pensions and rarely develop unfunded liabilities that burden future generations.

Unfortunately, Oakland County's strategies and experiences with collective bargaining are unusual. For instance, few communities or school districts have managed to avoid awarding unions agency-fee clauses in contracts. So while one rarely encounters the opposite extreme of budgeting following bargaining and contracts dictating spending, it would appear that few local governments meet Oakland's standards for discipline.

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* As described by Mackinac Center Adjunct Scholar Richard Dreyfuss, "In a defined-contribution plan, the employee and/or employer make ongoing contributions to a tax-favored account. These are invested, and they accumulate for the benefit of the individual at retirement. Generally, the investment decisions and the associated investment risks are the responsibility of the individual. Upon retirement, the employee can withdraw the account balance as either a lump sum or an annuity, according to the provisions of the plan." In contrast, "In defined-benefit plans, the employer assumes the responsibility of annually investing employer and employee pension contributions in amounts sufficient to finance a projected annual retirement income or projected insurance premiums for such items as retiree medical, dental and vision insurance. The projected benefits are generally set by a formula." See Richard Dreyfuss, "Michigan's Public-Employee Retirement Benefits: Benchmarking and Managing Benefits and Costs" (Mackinac Center for Public Policy, 2010), 3, http://www.mackinac.org/13862 (accessed Feb. 13, 2011).

However unfortunate, this is to be expected. Successful negotiations for government are dependent upon unity among members of the executive (mayors, county executives) and lawmaking branches (city councils, county commissions). This unity allows bargainers to act decisively. An ill-considered statement by an elected official will still carry considerable weight with the media and the public and create expectations among employees. As Warren Executive Administrator Louis Schimmel, a mayoral appointee, describes it: "If you don't have council behind you, it can be very difficult. Sometimes you have council members talking behind your back with the union or with employees. What's a negotiator to do?"[19]

But political divisions are an unavoidable part of democratic government. Natural ideological or interest-group divisions in local governments are compounded by the political power amassed by many government employee unions — power that is augmented by agency-fee funds. The temptation elected officials face to secure their current position or prepare for higher office by currying favor with government employee unions is considerable, and union officials are certainly capable of using this weakness to gain advantages at the bargaining table. A city where the council unites with a mayor or city manager to pursue fiscal discipline and responsible bargaining will be uncommon.

In addition, good collective bargaining in the government context requires expertise that many smaller communities may be unable to find. According to Schimmel:

> You absolutely need a great budget guy. If you don't have your budget and all the supporting documents together, the union representatives will just eat you up. They'll ask you question after question that you don't have answers for, and if you don't have answers, it gets to be really hard not to give in. They'll say you have to have money available somewhere.*

In theory, local governments could take steps to improve their budgeting and bargaining practices and encourage local officials to present a united front to unions. In practice, this is all highly unlikely. If collective bargaining is to evolve into a form compatible with sound fiscal practices, a well-funded and entrenched interest — government employee unions — will need to adjust its expectations downward, something that rarely happens in government without an intense political fight. At the same time, local elected officials throughout the state, many

* Louis Schimmel, Warren executive administrator, interview with Paul Kersey, June 4, 2010. Schimmel previously served as a court-appointed receiver for the small Michigan town of Ecorse, where he privatized city services and renegotiated union contracts. See Robert Daddow, "Responding to Municipal Fiscal Crisis: Bottom Line Lessons From Ecorse, Michigan" (Mackinac Center for Public Policy, 1992), http://www.mackinac.org/261 (accessed Feb. 13, 2011).

of whom may be dependent on government employee unions for political support or campaign funding, will have to unite around an agenda of fiscal responsibility and remain united for the long haul. Given the fractious nature of democratic politics and the ubiquity of agency fees, which give unions more resources to exploit divisions or sow discord, this is also highly unlikely.

To sum up, one could imagine a world in which PERA works much better than it has. Oakland County's practices show one way this might have happened. But the practices of governmental collective bargaining in Michigan are set, and the interest groups that have benefited most from those practices are well-financed. It is unrealistic to expect them to change absent changes to the law itself.

## THREE APPROACHES TO REFORM

Since changes to the law are necessary, there are three basic approaches to PERA that the Legislature and the new administration might take:

- Make one or more modest revisions to correct specific flaws in the law, while retaining the basic process of collective bargaining and the requirement that local governments bargain collectively.
- Undertake a thorough PERA overhaul that dispenses with PERA's mandate that local governments bargain with unions, and that leaves those governments free to bargain with unions at their own discretion, albeit with some restrictions to protect the public interest.
- End the PERA bargaining mandate and additionally prohibit collective bargaining in public schools and local government.

There are legitimate arguments for all three, and we will consider each in turn.

## I. REFORMS TO CORRECT SPECIFIC FLAWS

### Eliminating Agency Fees: Open Government Employment

There is a strong case to be made that a straightforward prohibition on agency fees applicable to government employees would by itself correct much of what has gone wrong with PERA. This "Open Government Employment" rule would still leave unions with the responsibility and authority to represent government employees in the workplace, and with some ability to lobby lawmakers. But rather than having dues automatically deducted and paid over according to the terms of

a collective bargaining agreement, individual workers would have the discretion to provide or withhold financial support based on their individual judgment of the union's performance of its duties.

In short, with open government employment in place, funding of government employee unions would be provided only by union members who join voluntarily, not by government officials who agree to an agency-fee clause. The union's ability to engage in political activism would thus be limited by the confidence that the union has among employees. The experience of states that do not permit agency fees in collective bargaining is that most employees will be willing to shoulder their fair share of the costs of representation. For instance, in Florida, which has a government employment rule similar to PERA and a ban on agency fees, 84 percent of government workers covered by collective bargaining agreements join the union and pay dues.[20] Nonetheless, under such an arrangement, union officials are encouraged to demonstrate that dues are needed for representation and to moderate their purely political activity to those issues where there is broad employee support.

Of course, many government employees may have a strong incentive to support political positions that expand government or increase its revenues, since this can provide employees with job security and increase the funds available for their wages and benefits. Still, this support will be neither unanimous nor automatic on every union lobbying effort. The countervailing economic pressure should moderate, though probably not completely eliminate, the tendency of government employee unions to support an aggressively statist agenda that burdens, rather than benefits, the public.

## Enhancing Financial Oversight

Short of an open government employment amendment to PERA, the Legislature could subject government employee unions to stricter financial oversight. The rationale for such oversight is entirely straightforward: Since the government effectively guarantees union dues when it signs a collective bargaining agreement with an agency-fee clause, it can rightfully insist on an accounting for how those funds are used.

Making union spending information available to union members and the public should prove useful to watchdogs both inside and outside of government unions and help prevent fraud. Currently, the coverage of financial reporting laws is spotty with regard to government employee unions. Some state and international union bodies are required under the Labor Management Reporting and Disclosure Act to

file financial reports known as "LM-2" or "LM-3" forms with the U.S. Department of Labor. The requirements, however, do not apply to all unions and do not apply at all to local unions that represent government employees exclusively.

At a minimum, all government employee unions should be required to file LM-2 or LM-3 forms, just as their private-sector cousins are required to do. It would be even better if union officials were required to file reports that were independently audited, something that is still not required for LM-2 reports.

Improved union reporting might also contribute to better "Hudson enforcement" law. As noted earlier, in the vast majority of unionized local government workplaces in Michigan, workers who refuse to join a union are still obligated to pay the union an agency fee. A line of U.S. Supreme Court decisions culminating in Chicago Teachers Union v. Hudson has established that government employees who pay an agency fee can have that payment limited to their pro-rata share of the costs of the union's core workplace representation duties: collective bargaining, contract administration and grievance representation.[21] In other words, nonmembers have a right to withhold money from union political activism.

Nevertheless, the current procedure for enforcing Hudson rights leaves much to be desired. There is reason to believe that dues reductions granted by unions to Hudson objectors vastly understate the extent of union political activism. For instance, our analysis of LM-2 reports filed by the Michigan Education Association and the National Education Association indicates that less than a third of that teachers union's dues are spent on core representation, while the MEA can insist that Hudson objectors pay more than two-thirds of regular member dues.[22] A complete and audited record of union spending might resolve that discrepancy and ensure that workers who oppose union politics are not forced to pay for them.

The rights of Hudson objectors could be more completely vindicated if the state allowed agency feepayers to appeal a union's Hudson determinations to the Michigan Employment Relations Commission or to the state courts. Legislators should also shift the burden of proof so that the union is obligated to show by clear and convincing evidence that agency fees cover only expenditures related to representation. Because the union ultimately controls its own records and can document its own activities far better than an employee can, this is not an unreasonable legal burden.

Caution is in order, however: Whatever their legal prerogatives and privileges might be, unions remain private institutions. A complete reckoning of union

political activity would require close state scrutiny of the day-to-day activities of union employees, and such scrutiny could set troubling precedents in terms of civil liberties. Furthermore, in a sense, all activities of government employee unions are "political." When a union negotiates performance standards and working conditions for government employees, it is influencing government operations, and when it negotiates over wages and benefits, it is affecting government spending. The line between political activism and representation is likely to be especially blurry in the realm of government employee unions.

While enhancing the enforcement of employees' Hudson rights deserves exploration, lawmakers will be on more solid ground if they prohibit agency-fee clauses outright and leave both union support and union oversight to union members.

## Limiting the Scope of Bargaining and the "Union Veto"

The successful implementation of any government initiative depends on the performance of government employees, since government employees carry out government policy. In the process of collective bargaining, a government employee union can influence government operations and how policies are implemented through the drafting of performance standards and work rules.[23] In extreme cases, government employee unions can have the power to subvert programs or policies that have been properly enacted in law — a "union veto."[24]

For instance, the intransigence of the Michigan Education Association, which refused to sign letters of understanding indicating that the union and its locals would cooperate with school districts in the creation of merit-pay programs for educational performance, undermined Michigan's application for grants under the federal "Race to the Top" program and thwarted the purpose of legislation passed by the state Legislature.[25] This "union veto" was wielded by union officials who were not accountable to the public at large, but rather were driven by the narrow interests of government employees or the officials' own ideological leanings.

There is no legitimate reason why the preferences of government employees or union officials should be privileged in this manner. Fortunately, the Legislature has already demonstrated that the union veto can be effectively nullified by removing issues from the scope of collective bargaining. For instance, school districts throughout the state have been able to save funds through the privatization of noninstructional services, such as food service, transportation and building

maintenance. But prior to 1994, fearing the loss of members, unions sought and often succeeded in adding clauses to contracts that prohibited districts from privatizing noninstructional services.[26] In 1994, the Legislature amended PERA, making privatization of these services a prohibited subject of bargaining.[27] Since then, the privatization of noninstructional services has continued to spread steadily, resulting in significant savings for school districts and taxpayers.[28]

In light of the state's experience with Race to the Top, the creation of merit-pay bonus programs would appear to be a subject that should be excluded from collective bargaining in local school districts. The Legislature should consider establishing basic parameters for teacher evaluation and merit bonuses and then allowing school boards to implement complying merit-pay programs without union recourse to collective bargaining.*

Similarly, teachers are already protected from politically motivated firings by the tenure system, so there is little need for contractually created procedures and standards relating to "for-cause" teacher dismissals.[29] Removing this subject from collective bargaining would do much to eliminate "the dance of the lemons"—the practice of shifting incompetent teachers from school to school while they continue to teach.

Mackinac Center research has shown that benefits for local government employees are substantially higher than those found in the public sector. Simply limiting health care and retirement benefit costs for government employees to the level found in the private sector would reduce the cost of state and local government by an estimated $5.7 billion annually, an amount that would certainly help balance state and local government budgets.[30] Currently these benefits are the subject of collective bargaining, and this bargaining process has resulted in an unjustified burden on Michigan taxpayers.

As we noted earlier, many school districts throughout the state have been pressured into purchasing health insurance through the Michigan Education Special Services Association, the MEA's favored insurance administrator, in spite of the presence of other insurers that could provide equivalent coverage at lower cost to taxpayers.[31]

Earlier proposals for the creation of a state-controlled health-insurance program for public schools, which would have the effect of taking health insurance out of the realm of collective bargaining, deserve further consideration.[32] Public Act 487

* A list of the prohibited subjects of bargaining appears in state law under MCL 423.215(3).

of 1996, which enrolled most state employees hired after March 1997 in defined-contribution pension programs, may also serve as a model for legislation that would replace collectively bargained defined-benefit pensions with defined-contribution programs for future local government employees.*[33] Taking this step would put individual workers in charge of their own retirements, while relieving school districts, many local governments and the state's taxpayers from the obligation to guarantee government workers' retirement incomes, a promise that has become uncommon in the private sector.[34] Collectively bargained benefits may be desirable, but fiscally sound public school systems and local governments are essential. In drawing up rules that govern benefits, the Legislature should be guided by sound fiscal policy, not a misguided commitment to preserve collective bargaining.

As the nonprofit Citizens Research Council has noted: "PERA is the predominant state statute governing public employee labor 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 has been held to prevail."[35] Our earlier report on PERA listed a string of Michigan court decisions that allowed contract provisions contradicting state and local laws to remain in effect.[36] CRC's analysis went on to observe that this allowed local governments and unions to effectively bargain away state and local laws — a state of affairs that represents a direct challenge to democratic self-government.[37]

In order to ensure that taxpayers are protected from the risk of overly burdensome collective bargaining agreements and that collective bargaining does not infringe on matters of policy, contracts negotiated with government employee unions should be held as inferior to county and municipal charters and statutes, as well as to state laws. Contract terms that contradict the terms of state or local law should be considered "ultra vires" — beyond the authority of local officials and therefore void. Such a rule would provide taxpayers with the ability to set firm and lasting limits on collective bargaining through the local charter amendment process. If the state courts are unable to correct this error, the Legislature should act to restore the proper relationship between collective bargaining agreements and state and local law.

A cautionary note is in order here: In 1994, the Legislature attempted to address the problem of school districts' being pressured into purchasing costly health

* The Legislature could go a step further and freeze the defined-benefit pensions for current employees, preserving their constitutionally protected accrued benefits. A defined-contribution program could then be established for their retirement savings during their future years of service.

insurance through the Michigan Education Special Services Association. PERA was amended to stipulate that the holder of an insurance policy (such as MESSA) was not a subject of collective bargaining. The language proved to be weak, however, and largely failed to place other insurance providers on a more competitive footing with MESSA. If the Legislature wishes to enact limits on collective bargaining subject matter, it should draft these broadly and clearly, with a complete understanding of what it wants to see bargained and what it wants to take off the table.

The Legislature should also pay attention to the question of how these prohibitions are enforced. The temptation for local officials and unions to ignore the law and reach agreements on prohibited subjects is very real, and the prohibitions themselves are not self-enforcing.* Stricter limitations will likely increase the temptation of scofflaw bargaining. To the extent permissible under the state constitution, the Legislature should expand legal standing to sue over prohibited contract terms and should establish criminal sanctions for blatant violations, where the intent to encroach on prohibited subject matters is clear.

## Ending the Strike Threat

Under the National Labor Relations Act, which governs private employees, both the union and the employer are required to bargain in good faith. The law does not assume, however, that all negotiations are conducted smoothly and result in agreement on a contract.[38] The union may call a strike, and management may "lock out" its employees.[39] In either case, work ceases; workers go without regular pay; and the company either finds replacement workers or endures a shutdown. In general, private-sector employers and employees are allowed to accept the risks and rewards of economic conflict.

In government, strikes and lockouts are generally considered an unacceptable risk. While some state collective bargaining laws allow strikes by nonessential government personnel,† PERA prohibits both strikes and lockouts without exception.[40]

In most cases where negotiations reach a stalemate, PERA calls for the state to mediate the dispute, beginning with the appointment of a mediator by the Michigan Employment Relations Commission. When the employer is a school

* For instance, the Mackinac Center Legal Foundation is currently litigating Chris Jurrians et al v. Kent Intermediate School District et al, a case brought by Kent County taxpayers against a number of Kent school districts, school board members and union officials for violating the state's prohibition on bargaining over the privatization of noninstructional services. The lawsuit is being challenged by the districts and other defendants on grounds that the five taxpayers lack standing to sue.

† Three examples are Ohio (see ORC 4117.14(D)(2)), Illinois (5 ILCS 315/17) and Minnesota (Minn Stats 179A.18).

district, PERA also provides for a fact-finding process, which the parties may agree to enter. If these dispute resolution procedures fail to bring about an agreement, the employer may implement its final offer of settlement — often referred to as its "last, best offer."[41] (There is one important exception to the "last, best offer" rule: In case of contract disputes involving police and fire personnel, state law provides for binding arbitration.)[42]

While PERA prohibits strikes, that prohibition has been flouted, most notably by unions representing schoolteachers. The remedies for illegal strikes have often proved inadequate: Court injunctions are defied, and striking workers have been able to wring concessions from their government employer before returning to work. For instance, in 2006, striking teachers in Detroit were able to limit concessions after an illegal strike.[43] Unions have also used strike threats to pressure districts into using the Michigan Education Special Services Association as an insurance provider, or to prevent school districts from establishing employee contributions to health care costs.[44]

Strikes remain a threat because the law provides inadequate penalties and inadequate enforcement mechanisms. The law provides no particular penalty for most government employees who engage in a strike, although school employees may be docked a full day's pay (which may not be made up at the end of the school year) for every day on strike. The law also provides for a $5,000 penalty to be assessed against a union that calls a strike.[45]

These penalties have proved inadequate. The fines are modest for union organizations that draw in hundreds of millions of dollars annually in membership dues, and individual teacher penalties are difficult to levy because each teacher is entitled to an individual hearing before a circuit court judge before being penalized.

Fortunately, strikes by teachers are less common than they have been in the past, but collective bargainers are subject to a wide range of pressures, and all of those pressures can affect the course of bargaining. Over time, a credible strike threat can cause a negotiator to make concessions he or she might not have made otherwise, even if a strike is never called. When the Legislature decided to include a strike prohibition, it is unlikely that it intended unions to be in a position to hold a strike threat over the heads of local officials. Even if strikes are rarely called, the failure of current law to provide an effective remedy is potentially a very costly vulnerability for local governments and taxpayers.

The solution is a stiffer penalty directed toward the party responsible for a strike. Collective bargaining in the government sector is a privilege, not a right, and an illegal strike is perhaps the ultimate abuse of the bargaining privilege. Hence, the proper penalty for striking is the withdrawal of recognition from the union: Abuse the privilege, lose the privilege. This penalty should be enforceable in court by any person affected by the strike, including parents of children enrolled in a school district, and should terminate for at least one year collective representation, bargaining and the collection of union dues.*

Although the rationale is different, this decertification penalty should apply even in the event of a "wildcat" strike — i.e., a strike undertaken by bargaining unit members without the approval of union officials. Even if union leaders oppose the wildcat action, union recognition is premised on the understanding that a majority of bargaining unit members support the union and wish to have it represent them. In a wildcat strike, the strikers' support of the union itself is in serious doubt. Wildcat strikers are taking a precipitous and illegal workplace action in open defiance of their supposed representatives. At some point, it is the union's responsibility to ensure that the persons it represents meet their legal responsibilities. If it cannot, it is entirely reasonable to conclude it has lost worker support and should forfeit its collective bargaining authority.

## Repealing Public Act 312

In the case of public safety, especially police and fire departments, Michigan Public Act 312 of 1969 establishes that when an impasse is reached, either side may call for "binding arbitration." In this case, binding arbitration consists of a three-member panel composed of a union representative, an employer representative and a neutral chairman selected from a list provided by the state. The panel resolves all disputes and effectively writes a contract.

The process has shown itself to be slow and unwieldy. In practice, all truly controversial issues are resolved by the single neutral arbitrator, who must choose between government and union proposals on key "economic" issues. In spite of the lengthy list of criteria given in the statute, the neutral arbitrator in fact has little guidance; the statute provides no priorities or burdens of proof, and the arbitrator's word is essentially final. As a consequence, a task force convened by Gov. Jennifer Granholm concluded that arbitration adds as much as 5 percent to the cost of local government.[46]

* At the time of this writing, Michigan Supreme Court standing rules would allow this legislative expansion of standing.

According to the statute, the purpose of binding arbitration is to provide an "expeditious, effective and binding procedure for the resolution of disputes." In terms of being expeditious, binding arbitration has clearly failed: Mackinac Center research has shown that the typical arbitration process lasts 15 months, and at least one arbitration decision was delayed to the point where the contract it was supposed to settle would have expired.[47] In terms of being effective and binding, the PERA rule allowing local government to implement its own last, best offer is every bit as serviceable. Given the funds available to unions for politics and the requirements of good-faith bargaining, the last, best offer will probably be reasonably fair as well. In short, the best solution to the problems created by binding arbitration under Public Act 312 is to end the practice.

If lawmakers are unwilling to end Act 312, they should at least take note of the sweeping discretion left to the "neutral" arbitrator. The arbitrator is in a position to award or deny government employees millions of taxpayer dollars without dealing with the consequences afterward and without effective review by the courts. If arbitration cannot be done away with politically, effective reform will start with changing the burden of proof. The union should have the burden to show by clear and convincing evidence that its economic proposals can be sustained without tax increases, diminishment of services or layoffs. Establishing a burden of proof would also allow effective review of arbitrators' decisions by the courts. Judges would be expected to defer to the arbitrator's judgment on the close calls, but an arbitration ruling that is clearly against the evidence can and should be set aside.

An arbitration award is, at bottom, an educated guess at what might be fair and what the local taxpayers can afford. At a time when so many local governments are facing a fiscal crisis, arbitrators should at least give taxpayers — not unions — the benefit of the doubt.

## Suspending Contracts in Financial Emergencies

The state has a legal process for managing local governments and school districts that are approaching bankruptcy. This law, the Local Government Fiscal Responsibility Act, calls for examination of local finances by state officials, and in the case of a financial emergency, the appointment of an "emergency financial manager."[48] This EFM has fairly broad powers over government operations and may rework the local government's budget; approve or reject expenditures, including the hiring of new staff; consolidate departments; sell off unneeded government assets; and contract with nearby governments for the provision of essential government services, such as police and fire. The EFM also takes over

the local government's role in collective bargaining and may ask to have current collective bargaining agreements renegotiated.[49]

As broad as the EFM's authority may be, the act still leaves union officials in a position to delay and perhaps undermine the EFM's work. The EFM may need to remove an unaffordable wage or benefit provisions from a city's collective bargaining agreement. The sooner he or she is able to do so, the sooner the city can have its budget balanced and begin its return to financial and economic health. Yet under the law, the EFM must still engage in good-faith bargaining, while the union continues to draw dues payments that it can use to reverse the EFM's changes later on, either through collective bargaining or through the political process.

The EFM has other tools at his or her disposal. As long as nearby governments are willing to contract to provide services to the troubled municipality, the contracting-out power may allow an EFM to dispense with collective bargaining and effectively purchase services elsewhere. The consequence of this is likely to be layoffs, however — layoffs that can often be avoided by the prompt restructuring of wages, benefits and work rules.

If a city, county or school district is truly facing an emergency in fiscal terms, then the situation should be treated as an emergency. In an emergency, necessary decisions are not negotiated; they are made and implemented. Collective bargaining is a privilege, not an inalienable right, and it is entirely reasonable that privileges that complicate the resolution of an emergency should be suspended until the emergency has passed. The Legislature should revise PERA or the Local Government Fiscal Responsibility Act to provide that all collective bargaining and collective bargaining agreements are automatically suspended for the duration of the emergency. Among other things, this would suspend the local government's collection of union dues.

Such a rule may seem harsh, but the interest of taxpayers in the prompt and thorough resolution of the financial emergency and the continuation of city services must take precedence over the interests of union officials or government employees in the continuation of collective bargaining. This rule would also have the salutary effect of providing union officials with a strong incentive to monitor the economic health of the communities where their members work and the fiscal strength of local governments and school districts with whom they bargain. Furthermore, it provides the unions with disincentives against making contract demands that cannot be sustained over the long term. Again, abuse the privilege, lose the privilege.

At a minimum, the EFM should have the authority to rescind or amend collective bargaining agreements. Such a rule will allow EFMs to act quickly to void the most expensive collective bargaining agreements while keeping more reasonable contracts in place. This in turn will make it easier for EFMs to provide relief to taxpayers without disrupting services or laying off workers unnecessarily.

## II. OVERHAULING PERA: VOLUNTARY LOCAL UNIONISM AND BARGAINING

So far, we have considered approaches to government employee labor law that are directed at specific problems: the misuse of union dues, the "union veto," strike threats and governmental financial emergencies. Our recommendations have ranged in magnitude, but on an individual basis, most of these proposals would leave the basic collective bargaining process intact.

### Ending PERA's Local Government Bargaining Mandate

PERA is a legal mandate placed on local governments that they bargain collectively with unions that are recognized as the representatives of workers in a given bargaining unit. This legal obligation is entirely a creation of PERA itself — neither the state nor federal constitutions establish any requirement that local governments bargain collectively. This mandate presents numerous problems for local government officials and taxpayers. Absent the bargaining mandate, the problem of the "union veto" would be much less serious, as local officials would be free to break off negotiations as they veer into policy. The mandate also has the effect of encouraging unions to make extreme demands, as local officials may be pressured by union political influence and the risk of an unfair labor practice finding to continue with negotiations at a time when talks are likely to be fruitless.

In just about any other context where negotiations take place, either party is free to suspend or break off talks permanently. Even in private-sector labor relations under the National Labor Relations Act, lockouts and strikes are allowed when a bargaining impasse is reached. Once it becomes clear that further negotiation is likely to be fruitless, the rational action is usually to walk away. True bargaining is based on a "win-win or no deal" mindset, in which neither side is expected to agree to terms that do not advance its own interests. PERA is unique in that it presumes that bargaining will ultimately result in an agreement. In the case of police and fire bargaining, state law even

provides that an arbitrator write an agreement if elected officials and unions are unable to reach one on their own.

Given the volume and severity of the problems we have identified with PERA, the Legislature might be better advised to scrap the law altogether. The question then would be what to put in its place.

One possibility would be to eliminate the bargaining mandate and instead allow collective bargaining to continue at the discretion of local governments. Local officials would be free to use the bargaining process to ensure that government employees have input on their wages and working conditions, but would not be required to do so.

Harmonious relations between government and its workforce, and the cultivation of a workforce that has a high level of morale, are important goals, and it is conceivable that bargaining could serve to advance those goals. But the interests of the government workforce are not paramount; when employee interests conflict with those of the public, the public interest must ultimately trump. In allowing local officials the discretion to engage in collective bargaining, the Legislature should create checks and balances to prevent the sorts of abuses we have seen under the current PERA. Specifically, there are three limitations that the Legislature can and should place on collective bargaining in the public sector if legislators end PERA's requirement that local governments engage in collective bargaining whenever a local public employees union is certified.

## Prohibiting Agency Fees in Local Government Unions

First, in order to protect the rights of taxpayers and local government employees, the practice of granting government employee unions an agency-fee clause should end. Agency-fee clauses have the effect of turning millions of dollars over to the unions with little oversight of how that money is spent. Because the union contracts directly with the government for these dues and fees, rather than allowing individuals to settle on an appropriate fee, it is not unrealistic to view union dues as coming from taxpayers rather than employees. It is widely known that a large portion of government employee union budgets is directed toward partisan politics and lobbying, an unacceptable use of what are essentially public funds. The funding of a government employee lobby is a matter for government employees themselves. The inclusion of an open government employment provision, prohibiting agency fees and allowing individual workers to decide whether to support a union, is an absolute necessity.

### Retaining Secret Ballots and Decertification

Second, the state should protect the rights of workers to choose their own representatives. At a minimum, this would mean that unions should not be recognized without a secret-ballot election of the workers. "Card check," in which a union is recognized as the collective bargaining representative when it simply collects signatures from a majority of employees in a bargaining unit, is an unreliable method for measuring worker support and is vulnerable to abuse.[50] Workers' right to remove a union that has lost majority support should remain as well.

### Preserving State and Local Laws: No "Ultra Vires" Contract Terms

Democratic self-government requires that local officials be accountable to the public for their actions, and that changes to local laws be achieved either through referenda (in which the public votes directly) or through an open legislative process in which representatives debate and vote. No private entity should be in a position to negate or revise the law to its own benefit, nor should local officials be able to effectively repeal or amend the law through a back door created by collective bargaining. As discussed earlier, the Legislature should clarify that contracts must conform to all relevant state and local laws; contract terms that violate these laws should be considered "ultra vires" and therefore void.

## III. POWER TO THE PEOPLE: THE CASE FOR A LOCAL GOVERNMENT COLLECTIVE BARGAINING BAN

Up to this point, we have assumed that some form of collective bargaining between local governments and employee representatives will at times be desirable for government employees, because it helps them improve their compensation and working conditions, and for local governments, because collective representation and bargaining might improve morale among their employees. This paper has examined a wide range of proposals intended to allow collective bargaining, while reining in various abuses of the process that have taken place under PERA. Any of these proposals would lessen the cost and improve the effectiveness of local government.

Many of the proposals might strike labor union advocates as severe, yet all spring from a fundamental principle of American governance: that government exists

to serve the public and is answerable to the public. Union advocates might argue that the reform proposals listed above would render government employee unions ineffective. If that is the case, then we must be prepared to consider the possibility that public-sector collective bargaining is ultimately incompatible with representative government and should be prohibited.

As we showed in our earlier report on PERA, the law has the effect of undermining local self-government, empowering union officials who are unaccountable to the public. This failure to maintain the prerogatives of citizens has had profound consequences.

When a union bargains with a private employer, the cost of wages, benefits or work rules may be passed on to the company's customers or be borne primarily by owners and investors, who will see profits diminished. But whether owners, investors or customers bear the cost, all are free to sever their relationship with the company and its unionized workforce. Owners can sell their shares; investors can invest in other firms; customers can take their business elsewhere.

By contrast, taxpayers must fund government programs and are unavoidably on the hook for any additional cost of collective bargaining — at least until they move elsewhere. Collective bargaining inevitably empowers government employee unions, whose interests can be directly opposed those of the majority of citizens. Over time, union interests can take on the force of government mandates. While the same can be said to some extent of any interest group that successfully lobbies the Legislature or the executive branch, collective bargaining puts government employee unions in a unique position to impose their desires on the general public: Elected officials are expected to negotiate at some length and reach an agreeable compromise with representatives of government employees, while retaining the ability to dismiss other interest groups curtly.

The consequences of this decision to empower union officials can be seen in the wide gap between public- and private-sector benefits — a gap estimated to cost state taxpayers $5.7 billion dollars annually, as noted earlier. The consequences also take the form of public schools that serve many students poorly yet are remarkably resistant to reforms. They are manifested in a powerful, institutional, taxpayer-funded lobby that uses union dues to advance an ideology that values activist government and dismisses the ambitions of individuals.

It is not clear that government employee unions improve morale. In fact, the process of collective bargaining often pushes unions to undermine morale;

when employers refuse to meet union demands, union officials will often seek to portray the employer's refusal as rooted in selfishness or scorn for workers' efforts. In the context of government, this means a union, legally recognized as a worker representative, is very likely to use its authority to foster animosity among government employees toward elected officials or even the public itself.

There is a strong case to be made that unlike their cousins in the private sector, government employees have no particular need to collectively bargain in order to protect their legitimate interests; their positions in government service provide them with unique opportunities to influence lawmakers. It is widely understood among political scientists that a lobbyist's most valuable assets are access to decision makers and knowledge of how government functions. Government employees have both.

While government is always prone to disruption as political parties jockey for power and elections swing control back and forth, workers do not necessarily need unions to protect them from partisan pressures. State and local civil service commissions already oversee government employees, create work classifications and establish compensation schedules. These commissions have effectively insulated workers from political pressures. Government employee unions, on the other hand, have taken on a distinctive ideology of their own and are among the most partisan institutions in the nation, as was outlined in the first part of this report.[51]

Law enforcement in particular is an area where union representation is likely to be problematic. Police work requires a high degree of discipline and judgment; on any shift, a police officer must be ready to use force effectively but judiciously, and he or she may be called on to make life-and-death decisions. In such an environment, strict standards and lines of command are essential. Collective bargaining complicates those lines of command by adding a third party to the relations between commanders and patrol officers.

Elected officials, government employees, taxpayers and union officials should always remember that collective bargaining in government has never been an inalienable right. As the U.S. Supreme Court ruled in Smith v. Arkansas State Highway Employees:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. … But the First Amendment does not impose any

> affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.[52]

The Michigan Constitution does state, "The legislature may enact laws providing for the resolution of disputes concerning public employees," but does not specify what form these laws should take.[53] The constitution does not mandate that the Legislature provide for collective bargaining or the recognition of unions. The Legislature may, for instance, encourage the creation of civil service commissions or create panels with the authority to adjudicate disputes between government employees and managers on an individual basis — something akin to a union grievance process to ensure fair treatment in the workplace. The Legislature may regulate and limit collective bargaining as it deems necessary to protect the public interest, or it may prohibit the practice outright.

Given the numerous difficulties associated with collective bargaining, and the persistent recklessness of government union officials in Michigan, a legislative ban on collective bargaining would probably be the safest course of action. This step would have the advantage of ensuring that the state makes a clean break from an era of undue public-sector union influence over government.

## CONCLUSION AND RECOMMENDATIONS

As much as one might question the actions and priorities of government employee union officials in the state of Michigan, the practice and effects of collective bargaining are ultimately the responsibility of the Legislature. It was the Legislature that passed the current PERA. The Legislature has revised the statute to positive effect in the past. As collectively bargained benefits become more and more burdensome for local governments, those governments and taxpayers understandably will look to the Legislature for relief.

When the state imposes collective bargaining on local governments and school districts, it inevitably infringes on local control of government. The infringements created by PERA have contributed to a growing financial crisis and have elevated government employee unions to a disproportionately powerful position in state and local politics, a position that they have used recklessly. It is incumbent on the state Legislature to rein in government employee unions and restore local control to the people of Michigan. At a minimum, this will mean revising PERA.

The point of bargaining — in any context — is that both sides attempt to work out an agreement that leaves them better off than they would have been otherwise.

If the parties — be they unions and employers or a pair of kids swapping trading cards — cannot find a deal that suits them both, then negotiations end without a contract. This "win-win or no deal" rule lies at the core of genuine good-faith bargaining.

The win-win or no deal principle leads directly to the conclusion that the bargaining mandate in PERA should be eliminated. Ideally, local government collective bargaining should be prohibited outright. If the Legislature is not prepared to take that step, PERA's bargaining mandate should be removed and bargaining should be left to the discretion of local officials with certain basic protections for workers and taxpayers.

At the very least, the Legislature should consider targeted reforms — such as an open government employment rule and suspension of bargaining and contracts in strikes or financial emergencies — that can ameliorate the problems associated with mandatory collective bargaining. But the Legislature should act decisively. Under no circumstances should local governments or school districts be left in a position where obeying the law is likely to lead them into signing a contract that is not in the best interests of the public that they are supposed to serve.

## ENDNOTES

1 Paul Kersey, "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences" (Mackinac Center for Public Policy, 2009), http://www.mackinac.org/10911 (accessed Feb. 10, 2011).

2 Smith v. Arkansas Highway Employees, 441 U. S. 463 (1979)

3 Richard Dreyfuss, "Michigan's Public-Employee Retirement Benefits: Benchmarking and Managing Benefits and Costs" (Mackinac Center for Public Policy, 2010), 8, http://www.mackinac.org/13862 (accessed Feb. 10, 2011).; see also James Hohman and Adam Rule, "Diminishing Private Sector Keeps Supporting Bloated Public Benefits" (Mackinac Center for Public Policy, 2009), http://www.mackinac.org/10839 (accessed Feb. 10, 2011).

4 Richard Dreyfuss, "Michigan's Public-Employee Retirement Benefits: Benchmarking and Managing Benefits and Costs" (Mackinac Center for Public Policy, 2010), 8-13, http://www.mackinac.org/13862 (accessed Feb. 10, 2011).

5 Michael Van Beek, "Michigan Public School Health Insurance Costs Soar Above National Trends" (Midland: Mackinac Center for Public Policy, 2010). See also Frank Webster, "School Boards Empowered to Save Insurance Dollars" (Mackinac Center for Public Policy, 2007), http://www.mackinac.org/9148 (accessed Feb. 10, 2011).

6 Paul Kersey, "Lansing Proposes, the MEA Disposes," The Detroit News, Feb. 4, 2010, http://

www.mackinac.org/12095 (accessed Feb. 10, 2011). See also Marc Holley, "A Teacher Quality Primer for Michigan School Officials, State Policymakers, Media and Residents" (Mackinac Center for Public Policy, 2008), http://www.mackinac.org/9576 (accessed Feb. 10, 2011).

7 Paul Kersey, "A Law Unto Itself: Police Contract Undermines Law and Order" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/12821 (accessed Feb. 10, 2011).

8 James Hohman, "Michigan Public Employees Compensation Growing Despite Concessions Claims" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/12433 (accessed Feb. 10, 2011); see also James Hohman, "Michigan Public Payrolls Protected in Recent Recession," Michigan Capitol Confidential, July 13, 2010, http://www.michcapcon.com/13169 (accessed Feb. 10, 2011).

9 Paul Kersey, "Union Spending in Michigan: A Review of Union Financial Disclosure Reports" (Mackinac Center for Public Policy, 2008), http://www.mackinac.org/9757 (accessed Sept. 1, 2009).

10 Paul Kersey, "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences" (Mackinac Center for Public Policy, 2009), 11-17, http://www.mackinac.org/10911 (accessed Feb. 10, 2011).

11 MCL § 423.207-207a; MCL § 423.25.

12 Paul Kersey and James Hohman, "Oakland County Gives Local Governments Something to Shoot For" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/13343 (accessed Feb. 10, 2011).

13 Tom Eaton, personal interview with Paul Kersey, June 16, 2010.

14 Ibid.

15 Ibid.

16 Ibid.

17 Paul Kersey and James Hohman, "Oakland County Gives Local Governments Something to Shoot For" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/13343 (accessed Feb. 10, 2011).

18 Oakland County Department of Management and Budget, Fiscal Services Division, "Oakland County, Michigan: Comprehensive Annual Financial Report, Fiscal Year Ended September 30, 2009" (County of Oakland, 2009), 11, http://www.michigan.gov/documents/treasury/630000OaklandCo20100325revised_326966_7.pdf (accessed Feb. 11, 2011).

19 Louis Schimmel, Warren Executive Administrator, interview with Paul Kersey, June 4, 2010.

20 Author's calculations based on Barry Hirsch and David Macpherson, "State: Union Membership, Coverage, Density, and Employment by State and Sector, 1983-2010" (Unionstats .com, 2010), http://unionstats.gsu.edu/State_U_2010.xlsx (accessed Feb. 14, 2011).

21 Chicago Teachers Union v. Hudson, 475 U. S. 292 (1986).

22 Author's calculations based on National Education Association-Michigan Education Association-Local Association Section E-1 2001-02 Service Fee Election Form and National Education Association-Michigan Education Association Section E-1 2007-08 Service Fee Election Form.

23 Paul Kersey, "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences" (Mackinac Center for Public Policy, 2009), 7-9, http://www.mackinac.org/10911 (accessed Feb. 10, 2011).

24 Ibid., 9-11.

25 Paul Kersey, "Lansing Proposes, the MEA Disposes," The Detroit News, Feb. 4, 2010, http://www.mackinac.org/12095 (accessed Feb. 10, 2011).

26 Tim Gladney, "Earning High Marks for Privatization in Pinckney" (Mackinac Center for Public Policy, 1997), http://www.mackinac.org/609 (accessed Feb. 10, 2011); see also "MEA Hypocritical on Privatization" (Mackinac Center for Public Policy, 1999), http://www.mackinac.org/9401 (accessed Feb. 10, 2011).

27 PA 112 of 1994, MCL § 423.215(3)(f).

28 James Hohman and Dustin Anderson, "Michigan Schools Contract Out More Than Ever" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/13530 (accessed Feb. 10, 2011).

29 MCL § 38.71 et seq. See also Ken Braun, "Many Senators Refuse to Stand Against 'Ineffective Teachers,'" Michigan Capitol Confidential, March 10, 2010, http://www.michcapcon.com/12308 (accessed Feb. 10, 2011); see also Michael Van Beek, "How to Remove an Ineffective Tenured Teacher in 13 Easy Steps" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/11898 (accessed Feb. 10, 2011).

30 James Hohman, "Bringing Balance to Public Benefits" (Mackinac Center for Public Policy, 2011), http://www.mackinac.org/14271 (accessed Feb. 10, 2011).

31 Michael Van Beek, "Most School Health Care Plans Are Too Expensive for Michigan" (Mackinac Center for Public Policy, 2010), http://www.mackinac.org/12083 (accessed Feb. 10, 2011).

32 Michael LaFaive and James Porterfield, "Health Savings Accounts Can Save Michigan Money" (Mackinac Center for Public Policy, June 30, 2009), http://www.mackinac.org/10731 (accessed Feb. 12, 2011); Jack McHugh and Janet Neilson, "Dillon Insurance Plan Could Generate Monumental Reform" (Mackinac Center for Public Policy, Oct. 5, 2009), http://www.mackinac.org/11071 (accessed Feb. 12, 2011).

33 Richard Dreyfuss, "Michigan's Public-Employee Retirement Benefits: Benchmarking and Managing Benefits and Costs" (Mackinac Center for Public Policy, 2010), 3, http://www.mackinac.org/13862 (accessed Feb. 10, 2011).

34 Ibid., 8-10.

35 "The Public Employment Relations Act: Conflicts and Possible Alternatives" (Citizens Research Council of Michigan, 1987), 1, http://www.mml.org/advocacy/pa312/publications/crc_report-pa312.pdf (accessed Feb. 10, 2011).

36 Paul Kersey, "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences" (Mackinac Center for Public Policy, 2009), 10, http://www.mackinac.org/10911 (accessed Feb. 10, 2011).

37 "The Public Employment Relations Act: Conflicts and Possible Alternatives" (Citizens Research Council of Michigan, 1987), 1-2, http://www.mml.org/advocacy/pa312/publications/crc_report-pa312.pdf (accessed Feb. 10, 2011).

38 29 USC § 158(d).

39 29 USC § 163 et seq. While there is no explicit authorization for lockouts under the National Labor Relations Act, the National Labor Relations Board has allowed employers to withhold work from employees as a means of putting economic pressure on workers during the course of negotiations. For a discussion of this topic, see *Patrick Hardin and John E. Higgins, The Developing Labor Law Fourth Ed., Vol. II*, 1511-1543 (Bureau of National Affairs, 2001).

40 MCL § 423.202.

41 MCL § 423.207, MCL § 423.207a.

42 MCL § 423.231-247.

43 "Classes Resume After Detroit Teachers End Illegal Strike," Michigan Education Digest, Sept. 19, 2006, http://www.educationreport.org/pubs/mer/article.aspx?id=7934 (accessed Feb. 10, 2011).

44 "MESSA an Issue in Contract Talks," Michigan Education Digest, Dec. 22, 2008, http://www.educationreport.org/pubs/mer/article.aspx?id=10096 (accessed Feb. 10, 2011); Paul Kersey, "Why School Districts Can't Save on Health Care" (Mackinac Center for Public Policy, 2004), http://www.mackinac.org/6053 (accessed Feb. 10, 2011); Andrew Bockelman and Joseph Overton, "Michigan Education Special Services Association: The MEA's Money Machine" (Mackinac Center, 1993), 39-41, http://www.mackinac.org/8 (accessed Feb. 14, 2011).

45 MCL § 423.202a.

46 The Task Force on Local Government Services and Fiscal Stability, "Final Report to the Governor" (State of Michigan, 2006), 31, http://www.michigan.gov/documents/FINAL_Task_Force_Report_5_23_164361_7.pdf (accessed Feb. 10, 2011).

47 Paul Kersey, "The Arbitration Gamble" (Mackinac Center for Public Policy, 2007), http://www.mackinac.org/8326 (accessed Feb. 10, 2001); Paul Kersey, "Proposal 3: Establishing a Constitutional Requirement Extending Mandatory Collective Bargaining and Binding Arbitration to State Government Employees" (Mackinac Center for Public Policy, 2002), 4, http://www.mackinac.org/archives/2002/s2002-04.pdf (accessed Feb. 14, 2011).

48 MCL § 141.1213, MCL § 141.1218.

49 MCL § 141.1221.

50 Paul Kersey, "The EFCA Rodeo" (Mackinac Center for Public Policy, Aug. 3, 2009), http://www.mackinac.org/10842 (accessed Feb. 12, 2011).

51 Paul Kersey, "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences" (Mackinac Center for Public Policy, 2009), 11-15, http://www.mackinac.org/10911 (accessed Feb. 10, 2011).

52 441 U.S. 463 (1979).

53 Mich Const Art 4, § 48.

## EXECUTIVE SUMMARY

Michigan's Public Employment Relations Act requires local governments and school districts throughout Michigan to bargain collectively with unions representing their employees. The collective bargaining process is a creation of the state Legislature, which also has the power to repeal or amend it.

In an earlier Policy Brief, "Michigan's Public Employment Relations Act: Public-Sector Labor Law and Its Consequences," we reviewed several negative effects that the 1965 law has had on Michigan government and the economy. For example, PERA has inadvertently granted public-sector unions, in their role as the representatives of government workers who implement local laws and policies, an effective veto power over many laws that have been passed by residents or their elected representatives. In addition, PERA has permitted local government employee unions to collect mandatory "agency fees" from government workers who do not wish to join, empowering those unions to become a permanent, subsidized lobby for big government.

No area of public policy in Michigan is more in need of fresh thinking than the relationship between government and its employees. With Michigan's recurring government budget struggles, and with a new Legislature and governor espousing a commitment to performance, efficiency and accountability in government, a new labor law for government employees is imperative.

This report outlines a variety of ways the Michigan Legislature can address the damaging impact of PERA. These options range from modest, targeted reforms to an outright ban on collective bargaining in local units of government.

Among the targeted reforms to correct at least some flaws in the law are the following:

- Establish additional statutory limits on the subject matter of collective bargaining, backed by a strong enforcement mechanism, to ensure that the public retains control over important policy decisions. At a minimum, the state Legislature should require that collective bargaining agreements conform with state laws and local ordinances.
- Suspend collective bargaining privileges and agreements when government employee unions flagrantly violate PERA by going on strike. Collective bargaining for government employees is a privilege, not a right. "Abuse the privilege, lose the privilege" is a sound rule.

- Bar agency fees from public-employee collective bargaining agreements — in other words, an "open government employment" rule — to end what has essentially become a taxpayer subsidy of union politics.

A more substantial overhaul of PERA would begin by withdrawing the mandate that local governments bargain collectively, leaving them free to bargain with unions at their discretion. If state policymakers choose this option, they should also provide some basic rules to protect workers and taxpayers, including a prohibition on agency fees, a nullification of contracts that contradict state or local laws, and the retention of both secret-ballot certification elections and the members' power to decertify their unions.

It is settled law that the Legislature could prohibit collective bargaining at the local level altogether. It is not at all clear that government employees need collective bargaining to protect their influence, given their civil service protections and given their unique knowledge of government operations and their regular contact with decision-makers — assets that are particularly valuable in the political context. It is also unclear that collective bargaining improves employee morale.

In any other context where two parties bargain to reach an agreement, including private-sector collective bargaining, it is understood that all parties are free to break off negotiations if they wish — a principle of "win-win or no deal." PERA is unique and problematic in insisting that unions and governments bargain. This inflexible mandate has resulted in the creation of numerous contracts that are not in the public's long-term best interest.

If government exists to advance the public interest, then the law ought not to enshrine any procedure that detracts from the public interest. Ideally, the Legislature would repeal PERA and ban public-sector collective bargaining in local government, ensuring that local governments overcome the numerous problems associated with mandatory collective bargaining and that the state makes a clean break from an era of undue public-sector union influence over government.

If legislators are uncertain about that step, they should repeal PERA's collective bargaining mandate and leave public-sector collective bargaining — with basic protections of the public interest — at the discretion of local government. At the very least, the Legislature should undertake targeted reforms like those mentioned above. In any event, the Legislature should act, and act decisively. Public officials in local government and school districts should no longer be pressured into signing contracts that are not in the best interests of the public they were elected to serve.

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