

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE**

THE CHARTER COUNTY OF WAYNE,

Plaintiff,

Case No. 17-004750-AW
Hon. Leslie Kim Smith

-v-

WAYNE COUNTY RETIREMENT
COMMISSION,

Defendant,

and

WAYNE COUNTY BOARD OF
COMMISSIONERS,

Putative Intervenor.

17-004750-AW

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/s/ Kimberley DeLoach

OPINION AND ORDER

**At a session of said Court held on
7/31/2017**

PRESENT: HON. LESLIE KIM SMITH

INTRODUCTION

This civil matter is before the Court on a “Motion for Declaratory Judgment, for Permanent Injunction and for Mandamus” filed by Plaintiff, the Charter County of Wayne (“the County”). Also before the Court is a “Motion for Declaratory Judgment” filed by Defendant, Wayne County Retirement Commission (“the Commission”) and a “Motion for Summary Disposition in Substantial Concurrence with Defendant Wayne County Retirement Commission’s Motion for Declaratory Judgment” filed by Putative Intervenor, Wayne County

Board of Commissioners (“the Board”). For the reasons stated below, the Court will deny the County’s motion and will dismiss its complaint.

I. BACKGROUND

In August 2015, a financial emergency was declared for the County of Wayne and, on August 17, 2017, the County and the State of Michigan entered into a consent agreement. The agreement granted the County Executive, then and now Warren Evans, the same powers granted to any emergency manager under the “local financial stability and choice act.” MCL 141.1541, *et seq*; 2012 PA 436.

Under MCL 141.1549(2), “an emergency manager shall act for and in the place ...of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers ...to rectify the financial emergency ... to provide ... necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager ...the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager” Under the act, the emergency manager is to issue orders to the governing body and executives to take certain actions necessary to implement a plan for financial stability. MCL 141.1550. An emergency manager under the act is also empowered to negotiate labor contracts.¹

¹

MCL 141.1552 provides in relevant part:

(1) An emergency manager may take 1 or more of the following additional actions with respect to a local government that is in receivership notwithstanding any charter provision to the contrary:

(k)... after meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment,

After entering into the consent agreement, the County Executive negotiated all but one of the collective bargaining agreements (CBAs). Regarding the one without a CBA, AFSCME Local 3317, the County, by order of the Executive, imposed County Employment Terms (CET) on that local bargaining unit. Both the CBAs and the imposed CET included a change in the composition of the Wayne County Retirement Commission (the Retirement Commission).

The Wayne County Employees' Retirement System (WCERS) is a public employee pension plan and trust which provides retirement, disability and survivor benefits for eligible Wayne County employees, retirees, and their beneficiaries. The WCERS was created under the authority of the County Pension Plan Act, MCL 46.1221. The WCERS is administered by the Retirement Commission.

a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and state treasurer determine that all of the following conditions are satisfied:

(i) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose.

(ii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.

(iii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.

(iv) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

(l) Act as sole agent of the local government in collective bargaining with employees or representatives and approve any contract or agreement.

[Emphasis added].

Prior to the consent agreement, the structure of the Retirement Commission was governed by Section 6.112 of the Wayne County Charter, which provides that there are 8 members including: “The CEO or the designee of the CEO, the chairperson of the County Commission, and 6 elected members. The members must be residents of Wayne County. Four members shall be active employees elected by active employees of the County in the manner provided by ordinance and 2 members shall be retired employees elected by retired employees of the County in the manner provided by ordinance. The term of the elected members is 4 years....” The Wayne County Code of Ordinances, Section 141-35 also provides for the same number of trustee members of the Retirement Commission.

Using the consent agreement as his authority, the County Executive proposed to change the structure of the Retirement Commission from that encompassed within the charter by increasing the number of its members from 8 to 10. The new commission would include the chairperson of the Retirement Commission or his or her designee, one selected by the Executive with approval from the County Commission, one selected by the Executive or his designee, two selected by the Executive who have financial experience, three members who are active employees, one retired member, and one selected by the Executive with approval from the Retirement Commission. The CBAs and the imposed CET all incorporated these changes.

According to the County, the WCERs have refused to “cede control of the board to new trustees appointed by the CEO.” [Wayne County’s Motion, p 1]. As a result, the County has filed in this Court a complaint for declaratory relief and mandamus followed by a motion for declaratory judgment, a permanent injunction, and request for mandamus. The Retirement Commission filed a response and a motion for declaratory judgment. The Wayne County Board

of Commission also filed a motion for summary disposition “in substantial concurrence” with the Retirement Commission’s motion.

II. STANDARDS FOR DECLARATORY JUDGMENT AND FOR MANDAMUS

A. Declaratory Judgment

MCR 2.605(A) governs declaratory judgments and provides:

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

[Emphasis added].

“The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people.” *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). A court has jurisdiction to issue a declaratory judgment only “[i]n a case of actual controversy.” MCR 2.605(A). A case of actual controversy does not exist where the injury sought to be prevented is merely hypothetical. *Shavers, supra* at 589. The appropriate test is “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Casualty Co v Pacific Coal & Oil Co*, 312 US 270, 273; 61 S Ct 510; 85 L Ed 826 (1941). See also *State, Michigan Dept of Soc Services v Emmanuel Baptist Preschool*, 434 Mich 380, 411; 455 NW2d 1 (1990).

The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants. *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291; 732 NW2d 160 (2006). “An ‘actual controversy’ exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights.” *Groves v Dept of Corr*, 295 Mich App 1, 10; 811 NW2d 563 (2011).

Here, the County has alleged that the Retirement Commission has refused to give up control and allow the new 10-member board to govern. It contends that the law has been violated and that injury will surely occur as a result. Hence, there is a “substantial controversy” and the parties do have adverse legal interests warranting the issuance of a declaratory judgment. *Maryland Casualty Co, supra*.

B. Mandamus

Mandamus is a writ issued by a court of superior jurisdiction to compel a public officer to perform a clear legal duty. *Jones v Dep’t of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003). To obtain a writ of mandamus, a plaintiff must establish that (1) he has a clear legal right- not possessed by citizens generally- to the performance of the specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform it, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy. *Inglis v Public School Employees Retirement Bd*, 374 Mich 10, 13; 131 NW2d 54 (1964). A plaintiff has the burden of demonstrating entitlement to this extraordinary remedy. *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004).

Accordingly, if the County has no right to have the current structure of the Retirement Commission changed and 10 new members empaneled, a writ of mandamus is inappropriate.

III. ANALYSIS

The County first argues that, under the Public Employment Relations Act (the PERA), the composition of the Retirement Commission is a mandatory subject of collective bargaining and that the PERA provisions take precedence over and preempt conflicting laws. Under MCL 423.215, mandatory subjects of bargaining are “wages, hours, and other terms and conditions of employment....” In the Courts view, nothing in the statute refers to the structure of the Retirement Commission as a subject of mandatory collective bargaining. However, the County cites several cases that support the notion that it is mandatory to bargain over the composition of the Retirement Commission.

The County first cites *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 630; 227 NW2d 736 (1975) where Michigan Supreme Court held that “[t]he supremacy of the provisions of the PERA is predicated on the Constitution . . . and the apparent legislative intent that the PERA be governing law for public employee labor relations.” However in the case at bar, there are vast numbers of persons, either non-represented employees (exempt employees) or former employees (retirees), who are affected by the decision to modify the Retirement Commission’s structure and who were not parties to collective bargaining process. Their voices have not been heard as they have no standing to be present at the collective bargaining table.

According to the County “[i]f either party proposes a mandatory subject, both parties are obligated to bargain about it in good faith.” *Pontiac Police Officers Ass’n v City of Pontiac*, 397 Mich 674, 679; 246 NW2d 831 (1976). This comports with the categories of collective

bargaining under the PERA: mandatory, permissive and illegal. *Id.* The *Pontiac Police Officers* court also explained permissive and illegal subjects:

Permissive subjects of collective bargaining are those which fall outside the scope of ‘wages, hours, and other terms and conditions of employment’, and may be negotiated only if both parties agree.

Illegal subjects are those which even if negotiated will not be enforced because adoption would be violative of the law...

[Footnotes omitted] *Id.*

The County also cites *City of Detroit v Michigan Council 25*, 118 Mich App 211; 324 NW2d 578(1982) and *Retired Detroit Police & Fire Fighters Ass'n v City of Detroit*, No. 272235; 2007 WL 404160, p 1 (Mich Ct App February 6, 2007), for the proposition that the composition of the retirement systems is a mandatory subject of bargaining. The County also contends that a “public employer's collective bargaining obligation prevails over a conflicting permissible charter provision.” *Pontiac Police Officers, supra*; citing *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44; 214 NW2d 803 (1974).

The County next cites *Detroit v Michigan Council 25*, claiming that the case held that the preemption of the PERA “avoids the Charter Board’s absurd result.” [Wayne County’s Motion, p 7]. In that case, the City adopted an ordinance to alter the composition of the Board of Trustees of the Detroit retirement systems by adding an additional City-appointed trustee. The Court of Appeals determined that the composition of the Board was a mandatory subject of bargaining and the City could not unilaterally change the composition of the Board without first collectively bargaining on the subject.

In the instant case, the County Executive negotiated with the unions, and reached agreement with all except one which was subjected to the imposed CET. The agreement added two members to the Retirement Commission, increasing the County Executive’s number of

selected members on the Commission and reducing the representation of the Wayne County retirees. It further specified certain qualifications that individuals must possess as a prerequisite to being a member of the commission. The question then is whether or not the CBAs and the imposed CET supersede the County Charter.

In response to the County's motion, the Retirement Commission argues that "terms in a CBA only govern those members of the bargaining unit that approved the CBA and those terms may not be imposed on employees and retirees who are not covered by the CBA and did not participate in the bargaining process." [Retirement Commission's Response, p 3]. In support, the Retirement Commission cites OAG, 1998, No. 6540 (September 22, 1988), in which the Attorney General opined that "[c]ollective bargaining agreements affect only those employees who are covered by the agreement and would, therefore, not affect supervisory personnel or retired employees who do not participate in the collective bargaining process." [Id, Exhibit A, p 2]. In other words, the CBA only governs those who bargain. Exempt employees, non-represented employees, and retirees do not participate in collective bargaining. Hence, it is not logical that the CBAs and the imposed CET would preempt the Charter and have affect over those who have no standing to participate in the collective bargaining process. It conflicts with law as prescribed by the County Charter and is "violative of law" because it creates a due process violation of the rights of employees and retirees not participating in the negotiation process. *Pontiac Police Officers, supra*.

In *Werdlow v City of Detroit Policemen & Firemen Ret Sys Bd of Trustees*, 269 Mich App 383; 711 NW2d 404, judgment vacated in part, app den in part 477 Mich 893; 722 NW2d 428 (2006), the Court of Appeals held that an action by the City of Detroit to enforce an arbitration award against unions who did not participate in arbitration proceeding violated

procedural due process rights of the non-participating unions and that the trial court had no jurisdiction to enforce the arbitration award against non-participating unions. The Supreme Court affirmed in part and reversed in part, stating:

Section 10 of 1969 Mich Pub Acts 312 (Act 312), MCL 423.240, provides that arbitration awards are final and binding on the parties to the arbitration. Here, the defendant unions were not parties to the arbitration imposing the 12–member Board of Trustees.

Werdlow v City of Detroit Policemen & Firemen Ret Sys Bd of Trustees, 477 Mich 893; 722 NW2d 428 (2006).

Like the non-participating unions in *Werdlow*, here there are numerous employees not covered by the CBAs and the imposed CET as well as retirees whose rights may well be affected by the change in the structure of the Retirement Commission.

Due process also requires consideration of the effect on the public at large, who may be required to pay for the increase in the Retirement Commission membership due to the change in its structure. The proposed change represents a change to the County Charter. Under Article 7, § 2 of the Michigan Constitution, “[n]o county charter shall be adopted, amended or repealed until approved by a majority of electors voting on the question.”² Furthermore, under the Charter Counties Act, MCL 45.501, *et seq.*, specifically MCL 45.514(1)(o), an amendment or revision of

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See also OAG, 1977-1978, No. 5097 (January 27, 1977), an Attorney General Opinion regarding Article 11, § 6 of the Michigan Constitution:

Thus a county board of commissioners may adopt an ordinance or resolution establishing a merit system for county employees which also provides for the submission of the question to a vote of the electorate of the county for approval or disapproval.

[Emphasis added].

Thus, a merit system established by charter may be changed by ordinance or resolution and must be submitted to a vote by the electorate of a county. Here, the change in the County Charter to accommodate the changes proposed by the County Executive must be put to a vote by the electorate of Wayne County.

the charter “shall not become effective unless the amendment or revision is submitted to the electorate of the county and approved by a majority of those voting.”

The case most resembling the instant case is *Sloan v Warren City Civil Service Commission*, 26 Mich App 555; 182 NW2d 815 (1970). The *Sloan* court held that “that a preexisting civil service plan, adopted pursuant to a city charter which received a majority vote of the electors voting on the charter, would satisfy the requirements of the constitutional provision.” *Id* at 563. It also held that a vote of the people would be required to modify the plan after the Constitution was adopted. *Id*. The Court of Appeals also concluded that it disagreed that “under the PERA, enacted in 1965, collective bargaining agreements must prevail over civil service provisions.” *Id*.

The Supreme Court remanded the *Sloan* case to the trial court to continue “the aborted trial” and “to make a complete and intelligible record, including the testimony of witnesses in support of all pleaded matters of fact, the proper identification and admission of all written exhibits, and the preparation and filing of findings of fact and conclusions of law in an orderly fashion so that future appellate courts will be able to pass upon the issues raised.” *Sloan v Warren Civil Serv Comm*, 386 Mich 437, 447–448; 192 NW2d 499 (1971).

In reverse manner, the court in *Detroit Police Officers Asso v Detroit*, 391 Mich 44; 214 NW2d 803(1974), held that the enactment of an ordinance establishing a residency requirement, despite its validity and compelling purpose, could not remove the duty to bargain under the PERA if the subject of the ordinance concerned the “wages, hours or other terms and conditions of employment” of public employees, which were matters made subject to mandatory bargaining under the Act. Thus, if an ordinance was read as removing a mandatory subject of bargaining

from the scope of collective bargaining negotiations, the ordinance would be invalid, the court held, as a result of its direct conflict with state law.

In the case at bar, unlike the *Detroit Police Officers Asso* case, the subject of changing the structure of the Retirement Commission was agreed to in collective bargaining or imposed upon the unions, but, as to all others effected, the change violates the Michigan Constitution by applying the change to classes of employees and retirees who have not participated in collective bargaining and by not allowing the public to vote on it.³

The same held true in *Roseville v International Assoc of Fire Fighters*, 53 Mich App 547; 220 NW2d 147 (1974), in which the court held that any attempt by the city to construe an ordinance so as to deny city employees protection under the PERA would be void. The enactment of an ordinance could not remove the duty to bargain under the PERA if the subject of the ordinance concerned the "wages, hours or other terms and conditions of employment" of public employees. Hence, an ordinance or charter change cannot remove the duty to collectively bargain any mandatory subject of bargaining, but no case addresses the due process implication of changes in a charter by way of ratified CBAs and the CET. However, in the present situation,

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See also *Senior Accountants, Analysts & Appraisers Ass'n v City of Detroit, et al*, 218 Mich App 263; 553 NW2d 679 (1996), (The city labor organizations, individuals affiliated with such organizations, and city employees and retirees brought two actions for mandamus and injunctive relief against the city and the city's charter revision commission, seeking to prevent placement on ballot for voter approval certain proposed city charter revisions affecting city pension and retirement system.) The court explained:

We reject plaintiffs' contention that the commission lacks authority to reconvene for the purpose of submitting on the November 5, 1996, election ballot the charter revisions it originally intended to propose. Ordinarily a city charter revision commission's work is finished once a proposed revised charter is approved by public vote. See the HRCA, § 18, M.C.L. § 117.18; M.S.A. § 5.2097. However, that is not the case in this instance because the commission's opportunity to place on the ballot *all* the provisions of the revised charter it wished to propose was thwarted by the intervention of the circuit court.

[Emphasis added] *Id* at 280.

bargaining occurred, but those not parties to the bargaining cannot be subjected to the change without due process. *Sloan*, Mich App at 563.

The County also asserts that, under the consent agreement with the State of Michigan, the County Executive was given the same powers as an emergency manager. As such, the County contends that the County Executive is empowered to alter the composition of the Retirement Commission. Under PA 436, the Local Financial Stability and Choice Act, MCL 141.1541, *et seq.*, an emergency manager has certain powers to effect the changes necessary to stabilize a municipality's financial condition. Under MCL 141.1549, "[u]pon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency...."

Emergency managers are empowered to make, approve, or disapprove of any contract, the creation of any new position, or the filling of any vacancy. MCL 141.1552(1)(g). Further, an emergency manager may act as the government's sole agent in collective bargaining. MCL 141.1552(1)(l). An emergency manager is also empowered to "[t]ake any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity...relating to the operation of the local government." The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities." MCL 141.1552(1)(ee). MCL 141.1552(1)(ff) also provides that an emergency manager in a local government may "[r]emove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government."

Although PA 436 allows an emergency manager to change the individual membership of “any office, board, commission, authority, or other entity which is within or is a component unit of the local government,” it does not authorize him to change the structure of any of the above. MCL 141.1552(1)(ff) grants the emergency manager the authority to “remove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government.” The applicable statutes are devoid of any authority for the emergency manager to modify the structure of the Wayne County Retirement Commission. The Court finds that an increase in the membership population, change in the allocation of members and additional prerequisites for becoming a member of the Charter approved Retirement Commission is an impermissible structural change and would require a vote of the people of the County of Wayne. By way of example, the same would hold true if an appointed emergency manager of a municipality governed by a local voter approved charter attempted to modify the structure of its city council board by reducing or adding to its membership. Such action would be void. There exists no authority for an emergency manager to change the structure of the Wayne County Retirement Commission.

IV. CONCLUSION

It is the opinion of this Court that any changes to the Retirement Commission are changes to the County Charter that must be submitted to the electorate for a vote pursuant to the Michigan Constitution, 1963 Const Article 7, § 2, and pursuant to the Charter Counties Act, MCL 45.514(1)(o). To do otherwise would be a violation of the due process rights of non-represented employees, exempt employees, retirees, and the public at large. Accordingly, the Court will deny the County’s motion and will dismiss its complaint.

Accordingly, on the basis of the foregoing reasoning,

IT IS HEREBY ORDERED that Plaintiff the Charter County of Wayne's Motion for Declaratory Judgment, for Permanent Injunction and for Mandamus is **DENIED**;

IT IS FURTHER ORDERED that Defendant Wayne County Retirement Commission's Motion for Declaratory Judgment is **GRANTED** and that, as requested in the motion, any changes to the composition to the Wayne County Retirement Commission must be accomplished by voter approval of an amendment to the Wayne County Charter;

IT IS FURTHER ORDERED that Putative Intervenor Wayne County Board of Commissioners' Motion for Summary Disposition in Substantial Concurrence with Defendant Wayne County Retirement Commission's Motion for Declaratory Judgment is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff the Charter County of Wayne's complaint is **DISMISSED**.

IT IS SO ORDERED.

This is a final order and resolves all pending claims in this Court.

/s/ Leslie Kim Smith

Hon. Leslie Kim Smith