

# BUTZEL LONG

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September 26, 2011

**VIA U.S. MAIL**

Board of Trustees, Detroit Police and Fire Retirement System  
City of Detroit  
Coleman A. Young Municipal Center  
2 Woodward Avenue, Suite 908  
Detroit, MI 48226

**Re: Meaning of Act No. 25, of the Public Acts of 2011 (House Bill 4135)**

Dear Trustees:

Mr. Don Taylor of the Retired Detroit Police & Fire Fighters Association has requested that I provide you with our legal opinion regarding the proper interpretation of Public Act No. 25 of the Public Acts of 2011, of the State of Michigan (referred to herein as “Act 25” and also known as “enrolled House Bill 4135”). He also provided to me a copy of the opinion to you of Mary Ellen Gurewitz of Sachs Waldman dated August 22, 2011.

## **I. Background.**

In 1996, voters of the City of Detroit adopted a new City Charter under the Home Rule City Act that added a 12<sup>th</sup> member to the Detroit Police and Fire Fighters Retirement System Board of Trustees. The new member was to be “[a] retirant, receiving benefits under the retirement system who shall be a resident of the city and elected by retired firefighters and police officers under procedures as established by ordinance.” Despite this new Charter provision, a retired member was not added to the Board. In response to a lawsuit brought by the Retired Detroit Police and Fire Fighters Association to require the City of Detroit to implement that Charter provision, the Michigan Court of Appeals on February 6, 2007, in an unpublished decision in *Retired Detroit Police and Fire Fighters Association v. City of Detroit, Mayor of Detroit and Detroit City Council*, ruled that the composition of the Board of Trustees is a mandatory subject of collective bargaining and that the Charter provisions enacted pursuant to the Home Rule Cities Act could not contravene the collective bargaining obligations imposed by the Public Employment Relations Act (“PERA”).

In response to that decision, Act 25 amended Section 15(10) of PERA effective May 11, 2011, to read as follows:

(10) If the charter of a city, village, or township with a population of 500,000 or more specifies the selection of a retirant member of the municipality's fire department, police department, or fire and police department pension or retirement board, the method of selection of that member is a prohibited subjects of bargaining.

This letter provides our opinion on the meaning of that amendment.

## **II. Interpretation of Act 25.**

**A. Interpretation Based Upon Statutory Language and Prior History.** Act 25 only applies to the board of trustees of a police or fire fighters pension or retirement system in a municipality with a population of 500,000 or more. The City of Detroit is the only municipality in the State of Michigan that has a population of 500,000 or more. Thus, Act 25 only applies to the City of Detroit Police and Fire Retirement System.

The City of Detroit Charter specified at the time of enactment of Act 25 that a retirant of the City of Detroit Police and Fire Retirement System shall be one of the twelve members of the Board of Trustees. Section 15(10) of Act 25 prohibits collective bargaining where the Charter of the City of Detroit specifies that a retirant member have a position on the Board of Trustees. Thus, Act 25 validates the provisions of the Charter of the City of Detroit, as approved by its voters, and prohibits collective bargaining over the issue of inclusion of a retirant on the Board of Trustees.

Act 25 has the effect of reversing the decision of the Michigan Court of Appeals in *Retired Detroit Police and Fire Fighters Association v. City of Detroit, Mayor of Detroit and Detroit City Council*, because it removes the right of the unions to bargain over a specification by the City of Detroit Charter that a retirant shall be selected a member of the Board of Trustees. Act 25 reversed the Court of Appeals because it eliminated the statutory basis in PERA for the decision of the Court of Appeals on that issue. PERA previously was held by the Court of Appeals to mandate that there be collective bargaining on that issue. Instead, under Act 25, the provisions of the City Charter control solely with respect to a retirant being a member of the Board of Trustees. PERA continues to apply and there can be collective bargaining with respect to the method of selection of the other members of the Board of Trustees.

**B. Press Release of Governor Rick Snyder.** The Press Release dated May 10, 2011, confirms the intent of Act 25. It states in part:

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Gov. Rick Snyder today signed legislation that ensures retired Detroit police officers and firefighters will have representation on the city's pension board, in accordance with the city charter. . . .

Making this change to state law so that retired Detroit police officers and firefighters have a say in how their retirement system is administered will make sure the concerns of retirees are taken into account. . . .

The City of Detroit adopted a new city charter in 1996 requiring a retired member of the police or fire department to serve on the Detroit Police and Firefighters Retirement Board of Trustees, but legal challenges have prevented a member from being added. House Bill 4135, sponsored by state Rep. Fred Durhal, modifies the Public Employment Relations Act so that if the charter of a city with a population of more than 500,000 requires a retiree to serve on the pension board, then the seat must be filled.

From the Press Release, there is no question that the intent of Act 25 is to provide retired Detroit police and firefighters a seat on the Board of Trustees.

**C. Opinion of Mary Ellen Gurewitz.** The opinion letter to the Board of Trustees by Mary Ellen Gurewitz dated August 22, 2011 (the "Gurewitz Opinion") concludes that the Association's efforts to secure legislation to prohibit the City and unions from bargaining over inclusion of a retirant on the Board of Trustees are going nowhere because the composition of the Board of Trustees is a mandatory subject of bargaining.

In support of her conclusion that collective bargaining is mandatory on this issue and that Act 25 doesn't apply, Ms. Gurewitz makes three arguments, as follows:

**1. Argument that PERA Mandates Collective Bargaining.** The Gurewitz Opinion cites the Public Employment Relations Act ("PERA"), MCL 423.201, *et seq.*; *City of Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211 (1982); *Pontiac Police Officers Ass'n v City of Pontiac*, 307 Mich 674 (1974); *Retired Detroit Police and Fire Fighters Association v City of Detroit, Mayor of Detroit, and Detroit City Council*, Docket No. 272235 (Feb. 6, 2007); and *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 273; 553 NW2d 679 (1996). However, these four cases all interpreted PERA as it existed prior to the enactment of Act 25.

The Gurewitz Opinion ignores the fact that Act 25 amended PERA to state "the method of selection of that member" is a prohibited subject of bargaining. The Opinion also ignores the fact that the purpose for enactment of Act 25 was to modify PERA and make the issue of the

placement of a retirant on the Board of Trustees a prohibited subject of bargaining. As noted in the Press Release of Governor Snyder (above quoted), the intent of Act 25 was to modify PERA in order to overturn prior legal challenges that prevented a retirant from being added to the Board of Trustees. In other words, the intent of Act 25 was to overturn the provisions of PERA and the four cases cited by Ms. Gurewitz and to validate the provisions of the Charter of the City of Detroit designating a retirant as a member of the Board of Trustees.

Relying on old law for interpretation of Act 25 defies logic when Act 25 was written for the purpose of overturning that old law.

**2. Argument Based on Act 312 Awards.** The Gurewitz Opinion relies on the DPOA 2003 Long Act 312 Award, the DPLSA 2003 Block Act 312 Award, the DPCOA 2010 Glazer Act 312 Award, the DPLSA 2011 Brookover Act 312 Award, the DPOA 2011 Agreement, the DFFA Act 312 Proposal, and *Werdlow v Police & Fire Retirement Bd*, 269 Mich App 383 (2006), to support its position that collective bargaining is mandatory. These Act 312 awards were made by three-member arbitration panels which issued awards when police officers and firefighters were unable to reach a voluntary resolution of contract terms through collective bargaining.

While these arbitration awards are of historical interest in illustrating that under prior law changes in the composition of the Board of Trustees occurred through collective bargaining and the Act 312 process, these awards only reflect the status of the law prior to the enactment of Act 25. Act 25 requires that one retirant be placed on the Board of Trustees of the Police and Fire Retirement System and prohibits collective bargaining regarding that requirement. Act 25 does not prohibit collective bargaining regarding any other seat on the Board of Trustees and does not impact the Act 312 arbitration process for other seats on the Board of Trustees. Act 25 only requires that one retirant be seated on the Board. The fact that previously the method of selection of all seats on the Board was determined by collective bargaining would not prevent the Michigan Legislature and the Governor from amending PERA, a statute it created, to prohibit collective bargaining on this issue or any other issue.

**3. Argument Based on Legislative Analyses.** The Gurewitz Opinion also relies upon a brief quote from the Legislative Analyses that “it is unclear what impact the bill would have” and concludes that because the collective bargaining agreements do not provide for a retirant member, Act 25 should be ignored. The quoted portion of the Legislative Analysis in the Gurewitz Opinion is from House Bill 4135 (which became Act 25). There also is a Legislative Analysis for its predecessor, House Bill 4917, which was an identical Bill. Both of these Legislative Analyses state that the Legislative Analysis “does not constitute an official statement of legislative intent.” Therefore, neither the Legislative Analysis quoted in the Gurewitz Opinion, nor the prior Legislative Analysis is anything more than the interpretation of two individuals who prepared the Analyses. J. Hunault is designated as the Legislative Analyst, while Mark Wolf is designated as the Fiscal Analyst for both Bills.

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Because the Legislative Analysis is not an official statement of legislative intent, it should bear no weight in the interpretation of Act 25. However, even if it is given some weight, the statement of the Fiscal Analyst quoted in the Gurewitz Opinion is inconsistent with the remaining discussion in the Legislative Analysis for House Bill 4135 and also with the entire Legislative Analysis of the predecessor to House Bill 4135, which was House Bill 4917 of 2010. House Bill 4917 of 2010 was identical to House Bill 4135 of 2011.

(a) **House Bill 4917 (2010)**. The Legislative Analysis for House Bill 4917 (First Analysis 9-1-10), states in part:

**Local Expenditure Impact:** The bill would have an indeterminate impact on expenditures of local units of government. . . . By specifying that the selection (election) for a retired member of a police/fire retirement system board added through a charter provision is a prohibited subject of bargaining, the bill would, on the surface, follow the selection process established by city charter and any additional city ordinance. The Detroit City Charter provides that the retiree member must be elected by retired firefighters and police officers under procedures established by ordinance.<sup>4</sup> As a result, then, the bill would result in some additional costs to the retirement system due to the printing and processing of ballots to elect the retirant member. Any resulting cost increases would not likely be a material amount in relation to the administrative expenses of the DPRFS.<sup>5</sup>

Thus, the “Local Expenditure Impact” portion of the Legislative Analysis of House Bill 4917 (which preceded but is identical to House Bill 4135 and Act 25), is clear that the Bill would implement the Detroit City Charter provision that provides for a retired member to be on the Police/Fire Retirement System Board and prohibits collective bargaining on that issue.

Footnote 5 (above referenced) states in part regarding the current process:

The method of selection of trustees (that is, who can sit on the board and who can vote in a trustee election) are determined under the collective bargaining process.

As such, footnote 5 of the Legislative Analysis of House Bill 4917 defines the words “method of selection of trustees,” as used in the Bill, to mean the question of “who can sit on the Board and who can vote in a trustee election.” Therefore, according to the “Local Expenditure Impact” of the Legislative Analysis of House Bill 4917, on its surface, the intent of the Bill is to implement the provisions of the City of Detroit Charter which specify that a retirant shall sit on the Board of

Trustees and specify who can vote in a trustee election and to prohibit use of the collective bargaining process to decide whether a retirant shall sit on the Board of Trustees and who can vote in an election for the retirant who sits on the Board.

While page 4 of the Legislative Analysis states regarding “Local Expenditure Impact” that “it’s unclear what impact the bill would have,” this is to be expected because the Bill would be expected to have little or no impact on local expenditures. The “Local Expenditure Impact” of the Analysis for House Bill 4917 also states that:

The bill seems to presume that the Detroit City Charter provision would now supersede the collective bargaining process, without specifically saying whether board composition is now a permissive or prohibited subject of bargaining, and no longer a mandatory subject of bargaining.<sup>10</sup>

In footnote 10, the Legislative Analysis states:

The bill essentially implements a provision that was previously held by the state Court of Appeals to be invalid.

Thus, this portion of the Legislative Analysis for House Bill 4917 correctly presumes that the intent is for the Detroit City Charter provision to supersede the collective bargaining process and that the Bill implement a provision that was previously held by the state Court of Appeals to be invalid.

Regarding the statement in the “Local Expenditure Impact” of the Legislative Analysis that the legislation does not specifically say whether Board composition is now a permissive or prohibited subject of bargaining, and no longer a mandatory subject of bargaining, the Bill is clear that the designation in the Detroit City Charter of a retirant as a member of the Board of Trustees of the Police/Fire Retirement System is a prohibited subject of collective bargaining. However, because it is silent with respect to other aspects of the composition of the Board of Trustees (i.e., the composition of all members of the Board of Trustees other than the retirant member), the Bill does not prohibit collective bargaining regarding the composition of all members of the Board of Trustees other than the retirant member.

In the “For” Argument portion of the Legislative Analysis, it states that the intent of the Bill is to permit the City of Detroit to include a seat for retiree members and not to “deny a voice to the City’s nearly 9,500 retired police and fire workers.” The “Against” Argument also refers to the bill being a “first step in taking away the right to negotiate for pensions and the operating structure that determines the benefits that are earned and eventually paid out to current and future members of the system.

Thus, both drafters of the Legislative Analysis of House Bill 4917 appear to be quite clear that the City of Detroit Charter provision supersedes the collective bargaining process with respect to the designation of the retiree member of the Board of Trustees. The Bill does not supersede the collective bargaining process with respect to the means of selection of the remaining positions on the Board of Trustees.

(b) **House Bill 4135 (2011).** The Legislative Analysis for House Bill 4135 (First Analysis (2-8-11)) by the House Fiscal Agency acknowledges that House Bill 4917 of 2010 is identical to House Bill 4917 (2011). House Bill 4917 was passed by both the House and the Senate in 2010 but was vetoed by Governor Granholm.

The Legislative Analysis for House Bill 4135 contains identical language to the Analysis for House Bill 4917 in its discussion of “The Apparent Problem” and its discussion of “The Content of the Bill.”

However, the “Fiscal Information” of the Legislative Analysis for House Bill 4135, which apparently was written by the Fiscal Analyst, Mark Wolf, was changed. It states:

The issue of the composition of the Detroit police and fire retirement system has a lengthy legal history, with state courts invalidating attempts to alter the composition of the Detroit Police and Fire Retirement System (DPFRS) board through city ordinance or city charter. Given past court rulings preventing a retiree member from being added, it’s unclear what impact the bill would have. These court decisions have made the composition of the board a matter of collective bargaining, not charter provision. The bill addresses the issue of *the method of selecting* the retiree member on the DPFRS board; that is, whether the retiree member would be elected by only the retiree members of the system, or only the active members of the system, or both sets of members – by providing that the “method of selection of that [retiree] member” would be a prohibited subject of bargaining. However, the bill does not appear to address the larger question of whether the inclusion [selection] of a retiree member on the DPFRS board would itself now be a prohibited or permissive subject of bargaining, and thus, whether a retiree member (regardless of how that member is to be selected) is to now be a member of the DPFRS board. [The current method of selection is determined under the collective bargaining process.]

The Fiscal Information Section for House Bill 4135 provides no explanation why the Fiscal Analyst deleted most of the language in the 2010 “Local Expenditure Impact” Section of the

Legislative Analysis of House Bill 4917 and substituted the above language in House Bill 4135. While the “Local Expenditure Impact” Section for the Legislative Analysis of House Bill 4917 is clear that the collective bargaining process is superseded to the extent that the City of Detroit Charter specifies that a retirant be on the Board of Trustees, the “Fiscal Information” Section of the Legislative Analysis for identical House Bill 4135 interpreted the words “the method of selecting” to refer solely to the “method of election” of the retiree member. Neither House Bill 4917, nor House Bill 4135 uses the words “method of election.” As noted in paragraph II, B, 1, above, footnote 5 of the Legislative Analysis for House Bill 4917 defined the “method of selection” of trustees to refer to “who can sit on the board and who can vote in a trustee election.” Inexplicably, the Fiscal Analyst dropped from the definition of “method of selection” the issue of “who can sit on the board” and, instead viewed the identical language in Act 4135 as only referring to the method of election of that board member.

By ignoring the plain meaning of the words “method of selection of that member” in Act 25, and substituting “method of election,” the Fiscal Analyst failed to grasp the meaning of what otherwise is clear statutory language.

When the Michigan Legislature adopted House Bill 4135 for the explicit purpose of superseding the decision of the Michigan Court of Appeals by providing that the City of Detroit Charter provision mandating that there be a retirant on the Board prevail over collective bargaining, it obviously did not intend that the words “method of selection of that member” should be solely limited to the “method of election of that member.” An interpretation of the words “method of selection of that member” to only refer to the “method of election of that member” would render Act 25 meaningless.

Act 25, as above quoted, refers to the “method of selection of that member,” which refers, in context, to the method of selection of one membership position on the Board of Trustees. As such, the words “method of selection of that member” refer back to the Charter’s specification that one membership position on the Board of Trustees be held by a retirant member. The “Fiscal Information” Section of the Legislative Analysis, by substituting the words “method of selection of the retirant member,” improperly changes the context of that statutory provision and leads to the invalid conclusion the Bill only was intended to cover the method of “election,” and not the actual selection of one membership position on the Board of Trustees.

The confusion of the Fiscal Analyst in the Fiscal Information portion of the Legislative Analysis for House Bill 4135 is in contrast to the Arguments “For” and the Arguments “Against” in House Bill 4135, as appears in that portion of the Legislative Analysis. According to that portion of the Analysis, proponents for the Bill argued:

It should become law to ensure a voice to the retirees of the Detroit police and fire departments-a silenced group of retirees who now

outnumber active-duty police and firefighters by a ratio of more than two-to-one.

The Legislative Analysis “For” the Bill further stated:

Based on the strong support demonstrated by both the citizens of Detroit as they voted to amend their city charter, and the duly elected representatives of Michigan’s citizens statewide, this bill should once again be passed by the legislature, ordered enrolled for presentation to the governor, and then signed into law.

The Legislative Analysis “Against” the Bill stated in part that:

Consequently, the spokesman continued, “it is absolutely essential that the collective bargaining rights over local pension system remain with the authorized representative of the active employees and the employer.”

The Legislative Analysis also quoted the veto message of Governor Granholm in vetoing House Bill 4917, where she stated the rationale for her veto message, as follows:

The actual content of House 4917 . . . would dictate from the State Capitol the resolution of issues relating to local retirement board membership that are best resolved locally at the bargaining table.

It is clear from the Legislative Analysis of the Arguments “For” and “Against” House Bill 4135, that the intent of the Legislature was to provide that if the Detroit City Charter specifies that a retiree member of a pension system shall sit on the Board of Trustees, that issue is a prohibited subject of collective bargaining. Governor Granholm recognized that fact in her veto of the 2010 legislation. The “method of selection of a trustee” include both the question of who can sit on the Board and how that person is elected. It is clear from the Legislative Analysis that Act 25 is intended to preclude collective bargaining over that issue.

Since neither Legislative Analysis constitutes “an official statement of legislative intent,” and the Fiscal Information Section of the Legislative Analysis of House Bill 4135 appears to reflect a misguided interpretation by the Fiscal Analyst (whose job is determining financial impact and not otherwise analyzing the legislation), it should be disregarded.

**4. Summary.** In summary, the Gurewitz Opinion provides no valid legal grounds for its conclusion that a retirant should not be seated on the Board of Trustees. Its argument based on the provisions of PERA and four cases has no merit because the four cases cited in the Opinion interpreted PERA as in effect prior to its amendment by Act 25. Its

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argument based on various arbitration awards under PERA as in effect prior to Act 25 and under Act 312 also has no merit because those awards predate Act 25 and would not prevail over validly enacted amendments to PERA. Finally, its reliance on a single statement by a Fiscal Analyst in the Legislative Analysis has no merit because it is contrary to other statements made by that same Analyst as well as statements by the Legislative Analyst for the same Bill. In any event, the Legislature does not view Legislative Analyses as constituting an official statement of legislative intent.

**III. Conclusion.**

Act 25 is clear that it validates the provisions of the Charter of the City of Detroit which designate a retirant as a member of the Board of Trustees of the Detroit Police and Fire Retirement System and that it precludes collective bargaining with respect to that one member of the Board. Act 25 was clearly intended to reverse the decision of the Michigan Court of Appeals on this issue.

The Press Release of the Governor also clearly explains the purpose and intent of Act 25.

The Gurewitz Opinion provides no valid legal basis to justify not giving Act 25 its full legal effect.

Therefore, it is our opinion that Act 25 should be interpreted to validate the provisions of the Detroit City Charter which mandate that a retirant be a member of the Board of Trustees of the Detroit Police and Fire Retirement System and to preclude collective bargaining with respect to the right of a retirant to sit as a member of the Board of Trustees as well as the manner of the election of the retirant member. Any narrower interpretation would be contrary to the legislative intent.

On behalf of the Retired Detroit Police and Fire Fighters Association, we request that the Board of Trustees comply with Act 25 and provide a seat on the Board of Trustees to a retirant.

Very truly yours,

**BUTZEL LONG, a professional corporation**

Robert G. Buydens

RGB/ers

Cc: George Orzech  
Sean Neary

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