STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

CHRIS JURRIANS, et al,

Plaintiffs,

Case No. 10-12758-CL
HON. JAMES R. REDFORD

-and-

KENT INTERMEDIATE SCHOOL DISTRICT, et al,

Defendants.

Patrick J. Wright (P54052)
Attorney for Plaintiffs
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
(989) 631-0900

Arthur R. Przybylowicz (P26492)
Gregory M. Steimel (P34911)
Attorneys for Defendants Michigan Education Association
1216 Kendale Blvd.
P.O. Box 2573
East Lansing, MI 48826-2573
(517) 332-6551

Craig A. Mutch (P27786)
Catherine A. Tracey (P63161)
MILLER JOHNSON
Attorneys for Defendants Kent Intermediate School District, et al
250 Monroe, N.W., Ste. 800
Grand Rapids, MI 49503
(616) 831-1700

DEFENDANT-SCHOOLS' REPLY BRIEF

Table of Contents

Index of Authorities

Page

Cases

Statutes

Index of Authorities
(continued)

Page

Rules

Introduction

On January 18, 2011, Defendant-Schools filed a motion for summary disposition on the grounds that Plaintiffs' lack standing, the Michigan Employment Relations Commission ("MERC") has exclusive jurisdiction over Plaintiff's claim, and the statute of limitations has expired. On February 11, 2011, Plaintiffs' filed a Brief in Response to Defendants' Motion to Dismiss ("Plaintiff's Response"), which contains numerous factual and legal inaccuracies. This Reply Brief corrects those inaccuracies.

Argument

I. PLAINTIFF'S CANNOT ESTABLISH STANDING.

Plaintiff-taxpayers claim that, under the Michigan Supreme Court's recent decision in *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; --- NW2d --- (2010), they have standing to challenge the legality of the no-privatization provision in Defendants' Collaborative Agreement for two reasons: (1) they have a "legal cause of action" under MCL 600.2041, which allows taxpayers to sue a governmental entity for unlawful expenditure of public funds; and (2) the Public Employment Relations Act's ("PERA") statutory scheme implies that the Legislature intended to confer standing on Plaintiffs. Plaintiffs cannot establish standing through either of these theories.

A. Plaintiffs Do Not Have a Legal Cause of Action.

1. Plaintiffs Cannot Establish "Taxpayer Standing" Under MCL 600.2041 Because They Have Not Alleged Any Illegal Expenditure of Funds.

In their Response Brief, Plaintiffs concede that school districts are "under no duty to privatize and that even if the no-privatization clause were removed [from the Collaborative Agreement], the school districts might spend the same amount of money." (Pl. Response Brief, p. 6). Citing *House Speaker v Governor*, 443 Mich 560 (1993), Plaintiffs nevertheless claim that

the Collaborative Agreement "necessarily involves the illegal expenditures of state funds on school employee services." Plaintiffs' reliance on *House Speaker*, *id.* at 560, is completely misplaced.

In *House Speaker*, two non-profit corporations sued the Governor after he abolished the Department of Natural Resources and created a "new" DNR through executive order. *Id.* at 564-65. The Court found that, assuming the new DNR had been illegally formed, it would not have the legal authority to make *any* expenditures; thus, any expenditures made by the agency would be illegal. *Id.* at 573. Unlike an illegally formed agency which has no lawful authority to make *any* expenditures, Defendant-Schools have broad authority to expend school money on school employees' services. MCL 380.11a (broadly grants school districts the power to "contract for...employees" and "expend school district money"). Such expenditures would only be unlawful if they were required by an unlawful provision in the Collaborative Agreement, which they clearly are not because, as even Plaintiffs concede, Defendant-Schools have no duty to privatize. Because there has been no illegal expenditure of state funds, Plaintiffs cannot establish "taxpayer standing" under MCL 600.2041.

2. *Menendez* and Its Progeny, Which Require A Taxpayer to Prove Substantial Injury or Loss Through Increased Taxation In Order to Maintain a Taxpayer Action, Are Not "Obsolete."

Plaintiffs have not suffered any injury or loss as taxpayers as a result of the no-privatization provision in the Collaborative Agreement, and nowhere in the Complaint or in their Response Brief do they suggest that they have. Plaintiffs have therefore asked this Court to ignore over forty years of clear Michigan precedent holding that, to maintain a taxpayer action, the plaintiff-taxpayer must show that "he will sustain substantial injury or suffer loss or damage as a taxpayer, through increased taxation and the consequences thereof" as a result of an illegal government expenditure. *Menendez v City of Detroit*, 337 Mich 476; 60 NW2d 319 (1953);

Rayford v City of Detroit, 132 Mich App 248; 347 NW2d 210 (1984); *City of Grand Rapids v Kent County*, 96 Mich App 15; 292 NW2d 475 (1980); *Kaminskas v City of Detroit*, 68 Mich App 499 (1976); *Westen v City of Allen Park*, 37 Mich App 121; 194 NW2d 542 (1971).

Plaintiffs claim that *Menendez* and its progeny should be ignored because *Menendez* was decided before the Legislature enacted MCL 600.2041, and none of the Court of Appeals cases decided after MCL 600.2041 discuss the interplay between MCL 600.2041 and *Menendez*. In *Waterford School Dist v State Bd of Ed*, 98 Mich App 658; 296 NW2d 328 (1980), however, the Court of Appeals clearly explained that *Menendez's* "substantial injury" requirement must be established to maintain a taxpayer action under MCL 600.2041:

> The Revised Judicature Act permits litigation to prevent the illegal expenditure of state funds or to test the constitutionality of a related statute "in the names of at least five residents of this state who own property assessed for direct taxation by the county wherein they reside". M.C.L. s 600.2041(3), M.S.A. s 27A.2041(3). The taxpayers must demonstrate that they will sustain substantial injury or suffer loss or damage as taxpayers, through increased taxation and the consequences thereof. *Mendez v. Detroit*, 337 Mich. 476, 482, 60 N.W.2d 319 (1953), *Jones v. Racing Comm'r*, 56 Mich.App. 65, 68, 223 N.W.2d 367 (1974). A taxpayer lacks standing unless these requirements are met.

Plaintiffs also suggest that *Lansing Schools*, 487 Mich 349, implicitly overruled *Menendez,* arguing that *Menendez* is "squarely within the *Lee* camp." (Pl. Response Br., p. 8-9). That suggestion is preposterous. *Menendez* was decided 48 years before *Lee v Macomb Bd of Comm'rs*, 464 Mich 726 (2001), and is based on Michigan's historical standing doctrine, which was specifically resurrected by *Lansing Schools,* 487 Mich 349, not the federal constitutional principles relied upon in *Lee*, 464 Mich 726.

B. PERA's Statutory Scheme Does Not Imply That The Legislature Intended To Confer Standing on Taxpayers.

In *Lansing Schools*, 487 Mich 349, the Court analyzed the historical development of Michigan's standing doctrine, and noted that one method of establishing "standing" that has been recognized by Michigan courts is proof that "the statutory scheme implies that the Legislature intended to confer standing on the litigant." Relying on *Romulus City Treasurer v Wayne County Drain Commissioner*, 413 Mich 728, 741; 322 NW2d 152 (1982), the Court explained:

> In cases involving public rights, the Court held that a litigant established standing by demonstrating a "substantial interest [that] will be detrimentally affected in a manner different from the citizenry at large." Additionally, however, the Court recognized that even if a statute did not expressly grant standing, **it could be implied from duties created by law.** *See Romulus City Treasurer v Wayne Co Drain Comm'r*,... stating that there were cases in which 'standing was not expressly granted by statute [but] **standing was implied by the duties and obligations that were expressly stated.'** Thus, where a statute did not expressly grant standing, this Court would consider whether the Legislature nonetheless intended to confer standing on the plaintiffs. *Id.* (emphasis added).

Notably, in *Romulus City Treasurer*, 413 Mich at 741, the Court did not ultimately find that standing could be implied by the "duties and obligations expressly stated" in the statute at issue. In that case, the township and city treasurers sued the drain commissioner and the county, alleging that the county and drain commissioner had committed constructive fraud by collecting money for administrative expenses through special assessments. By statute, the township and city treasurers were responsible for paying the taxes collected from drain assessments to the county. The statute did not, however, grant the city and township treasurers the authority to review the actions of the drain commissioner. While the *Romulus City Treasurer* Court recognized that there were cases where "standing was implied by the duties and

obligations that were expressly stated," it found that the treasurer-plaintiffs had not asserted any express statutory duties or obligations from which standing could be implied. *Romulus City Treasurer*, 413 Mich at 741.

There is even less basis for taxpayers to claim "implied standing" under PERA. PERA imposes duties and obligations on public employers and their employees' bargaining representatives; it does not impose any duties or obligations on taxpayers, much less any express duties or obligations that would be sufficient to imply a legislative intent to confer standing on taxpayers. MCL 423.201 *et seq.*; *Romulus City Treasurer*, id. at 471; *see also Bradley v Saranac* (holding that the plaintiff-teacher had no standing to claim that FOIA's "frank communication" exemption precluded disclosure of her performance evaluations because it was the public body's duty to demonstrate that the public interest in disclosure is outweighed by the public interest in frank communications, making the public body the only proper party to raise the exemption).

To prove a "legislative intent to confer standing," Plaintiffs rely entirely on a lengthy (and oftentimes flawed) analysis of PERA's legislative history, which they claim reflects distrust in public employers and their wherewithal to deny union demands. This interpretation of the legislative history is not consistent with the plain language of PERA, which broadly grants public school employers the "sole authority" to make decisions on prohibited subjects of bargaining. MCL 423.215(4). But even if PERA's legislative history did reveal a concern about the ability of public school employers to make sound fiscal decisions during collective bargaining (which it does not), legislative history is not sufficient to prove that the legislature intended to confer standing on a litigant. *Id.* As the Court stated in *Romulus City Treasurer*, *id.*, legislative intent to confer standing is implied by a "duty or obligation expressly stated in the statute." (emphasis added). Plaintiffs have not identified any "duties or obligations" imposed

upon them in PERA; accordingly, they cannot show that the Legislature intended to confer standing on them.

C. Plaintiffs Have Not Established An "Actual Controversy" Under the Declaratory Judgment Rule.

Plaintiffs argue that, because there has been a change in school board membership since the Collaborative Agreement was executed, Defendant-Schools may now want to privatize. Based on this hypothetical scenario, Plaintiffs' claim that there is an "actual controversy." It is well-settled, however, that there is no "actual controversy" when the alleged conflict is merely hypothetical. *Shavers v Kelly*, 402 Mich 554, 588-89; 267 NW2d 72 (1978). Moreover, Plaintiffs' argument ignores the fact that the no-privatization provision in the Collaborative Agreement is unenforceable. Accordingly, if any of the Defendant-Schools decided they wanted to privatize (which they do not), nothing in the Collaborative Agreement would stop them from doing so. As a result, there is no "actual controversy" and Plaintiffs cannot satisfy the requirements of the declaratory judgment rule. MCR 2.605.

II. MERC HAS EXCLUSIVE JURISDICTION OVER PLAINTIFF'S CLAIM.

Plaintiffs attempt to avoid MERC's exclusive jurisdiction over violations of PERA by arguing that "MCL 423.215 was implemented after both MCL 423.210 and MCL 423.216" and "the Legislature did not seek to use the MERC framework for unfair labor practices for violations of MCL 423.215." (Pl. Response Br., p 19). But contrary to Plaintiffs' claim, Section 15 has been part of PERA since its enactment in 1965. And though the Legislature did not specify the procedure for handling alleged violations of Section 15 when it amended PERA in 1993, that was not necessary because Section 16 of PERA already provided a procedure for resolving unfair labor practice disputes. MCL 423.216.

Importantly, if the Legislature had intended to grant taxpayers the right to bring an action in circuit court to enforce the "prohibited bargaining" provisions of Public Act 112, it could have easily done so. In fact, the Legislature did this with other provisions of Public Act 112. For instance, in Section 17 of PERA, which was created by Public Act 112 to prevent bargaining representatives and education associations from improperly interfering with agreements made between a public employer and bargaining unit, the Legislature specifically granted "any other person adversely affected by the violation" of Section 17 to "bring an action to enjoin the violation ... in the circuit court." MCL 423.217. The fact that the Legislature did not confer this same right on taxpayers to enjoin violations of Section 15 makes it clear that it intended any alleged violations of Section 15 to be subject to the exclusive procedure in Section 16 for resolving unfair labor practice disputes.

Finally, Plaintiffs' assertion that "there is no need for MERC expertise" in the interpretation of Section 15 of PERA is absurd. (Pl. Response Brief, p. 20). The unfair labor practices enumerated in Section 10 of PERA (which include "to refuse to bargain collectively ..."), are clearly subject to MERC's exclusive jurisdiction and reinforce the public policy of Michigan by preserving the stability and effectiveness of labor relations in the public sector. The collective bargaining obligations discussed in Section 15 advance that same policy by laying out the framework for the bargaining process. Because the collective bargaining process is an inextricable element of the overall policy advanced by PERA, it clearly requires MERC's expertise and is subject to MERC's exclusive jurisdiction.

III. PLAINTIFFS' COMPLAINT IS BARRED BY THE APPLICABLE SIX-MONTH STATUTE OF LIMITATIONS.

The single count contained in Plaintiffs' Complaint alleges a violation of PERA. Compl. ¶ 66. In Plaintiffs' Response Brief, however, they inexplicably attempt to characterize

their claim as an action for breach of contract, subject to the limitations period set forth in MCL 600.5807(8) for "actions to recover damages or sums due for breach of contract." Plaintiffs' Complaint fails to allege any contractual relationship between the parties, let alone the breach of any contractual obligation. Accordingly, the six-year statute of limitations set forth in MCL 600.5807(8) cannot possibly be considered the appropriate statute of limitations.

Plaintiffs' Complaint is based entirely upon allegations that Defendants violated Section 423.215(3)(f) of PERA. Section 1 of PERA, MCL 423.1, provides that "the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes." Michigan's public policy in favor of prompt settlement of labor disputes is also evidenced by the six-month limitations period contained in Section 16 of the PERA. *Silbert v Lakeview Ed Ass'n*, Inc, 187 Mich App 21, 25; 466 NW2d 333 (1991). This six-month limitations period has consistently been applied to unfair labor practice claims brought under the PERA, and should likewise be applied to Plaintiff's claim under Section 15 of PERA. *See Leider v Fitzgerald Ed Ass'n*, 167 Mich App 210; 421 NW2d 635 (1988)(fair representation claim under PERA subject to six-month statute of limitations).

Section 15 of PERA does not contain an explicit limitations provision; however, where the Legislature has not provided a statutory period of limitation governing a particular claim, courts will adopt the period of limitation contained in analogous statutes. *See Herweyer v Clark Highway Services, Inc*, 455 Mich 14, 23; 564 NW2d 857 (1997). The unfair labor practices enumerated in Section 10 (which include the duty to bargain collectively as set forth in Section 15) are clearly subject to the six-month limitations period in Section 16 and reinforce the public policy of Michigan by preserving the stability and effectiveness of labor relations in the public sector. Plaintiffs' PERA claim is therefore subject to the six-month statute of limitations

period contained in MCL 423.216(a). Because Plaintiffs filed this lawsuit over three months after the six-month statute of limitations expired, their claim should be dismissed under MCR 2.116(c)(7).

Conclusion

For the reasons stated in Defendant-Schools Motion and Brief in Support of Summary Disposition as well as those stated in this Reply Brief, Defendant-Schools respectfully request that the Court dismiss Plaintiffs' Complaint.

Miller Johnson

Attorneys for Defendants Kent Intermediate School District, et al

Dated: February 16, 2011

By _____

Craig A. Mutch (P27786)
Catherine A. Tracey (P63161)
Business Address:
250 Monroe Avenue NW, Suite 800
Grand Rapids, Michigan 49503
Telephone: (616) 831-1700

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

CHRIS JURRIANS, et al,

Plaintiffs,

Case No. 10-12758-CL
HON. JAMES R. REDFORD

-and-

KENT INTERMEDIATE SCHOOL DISTRICT, et al,

Defendants.

Patrick J. Wright (P54052)
Attorney for Plaintiffs
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
(989) 631-0900

Arthur R. Przybylowicz (P26492)
Gregory M. Steimel (P34911)
Attorneys for Defendants Michigan Education Association
1216 Kendale Blvd.
P.O. Box 2573
East Lansing, MI 48826-2573
(517) 332-6551

Craig A. Mutch (P27786)
Catherine A. Tracey (P63161)
MILLER JOHNSON
Attorneys for Defendants Kent Intermediate School District, et al
250 Monroe, N.W., Ste. 800
Grand Rapids, MI 49503
(616) 831-1700

PROOF OF SERVICE

Linda Singstock hereby states that she is an employee of the law firm of Miller Johnson and that on the 16th day of February, 2011, she served a copy of Defendant-Schools' Reply Brief upon the following upon the following via U.S. Mail:

Patrick J. Wright (P54052) Attorney for Plaintiffs Mackinac Center Legal Foundation 140 W. Main Street Midland, MI 48640	Arthur R. Przybylowicz (P26492) Gregory M. Steimel (P34911) Attorneys for Defendants Michigan Education Association 1216 Kendale Blvd. P.O. Box 2573 East Lansing, MI 48826-2573

I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: February 16, 2011

Linda Singstock