STATE OF MICHIGAN
IN THE THIRD JUDICIAL WAYNE COUNTY CIRCUIT COURT

Rebecca Metz, Nancy Rhatigan,
and Angela Staffke,

Plaintiffs,

v

Taylor Federation of Teachers AFT Local 1085
and Taylor Public School Board of Education
and Taylor School District,

Defendants.

Case No.: 13-002906 CK

Hon. Daphne Means Curtis



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# DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION

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## Introduction

The Court should grant summary disposition and dismiss Plaintiffs' complaint because Plaintiffs lack standing to sue, the Michigan Employment Relations Commission has exclusive jurisdiction with regard to enforcement of the Public Employment Relations Act, MCL 423.201 et seq. and the complaint otherwise fails to state a claim on which relief can be granted. Controlling decisions by the Michigan Courts and the Michigan Employment Relations Commission apply to each part of Plaintiffs' complaint. The Court should reject this effort to attack a collective bargaining agreement by persons who are not parties to the contract.

## The Parties

Plaintiffs are three individuals employed by the Taylor Board of Education. Each is a member of the bargaining unit represented by the Taylor Federation of Teachers. Each is a voluntary member of that Union. Neither Plaintiff is a party to the collective bargaining agreement.

The Defendant Taylor Federation of Teachers is a labor organization. It is the certified bargaining agent for a unit of employees of the Taylor Board of Education. The Taylor Board of Education is the agent for the Taylor School district. The Taylor School District is the geographic entity which is a body corporate. The Board of Education and the Federation of Teachers are parties to a collective bargaining agreement; the School District is not. Plaintiffs are not.

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## The Facts

A.

On January 24, 2013, the Taylor Federation of Teachers and the Taylor Board of Education reached agreement on the terms of a collective bargaining agreement to replace a contract which had expired on August 16, 2011. The negotiations had been challenging; the parties had been in bargaining for nearly three years. The process was particularly difficult due to the significant economic challenges facing the School Board. An agreement was approved after long and difficult bargaining.

The 2013 agreement required Taylor teachers to make a substantial contribution toward resolving the Board's financial challenges. Teachers agreed to reduce their wages by 10 % immediately and continue the concession until 2016. The reduction in salary was accompanied by other concessions including the partial suspension of incremental step increases, the reduction of stipends paid to coaches and elimination of milage paid for driving on school business. The savings to the Board of Education were substantial. Teachers approved this agreement because they knew that their school district needed the help. The contract was approved by the Board of Education as well. The new contract became effective on February 11, 2013.

The collective bargaining agreement includes changes to other parts of the expired agreement including teacher evaluation. And the Union agreed to dismiss an unfair labor practice charge which was pending at the Michigan Employment Relations Commission; if successful, the charge might have cost the school district nearly $250,000. The parties also agreed to update and extend their "union security" clause.

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B.

1.

The Taylor collective bargaining agreement had had, for four decades, a provision generically known a "Union Security" clause. Also called an "agency fee" or "fair share" clause, such articles are extremely common in both public sector and private sector agreements. As then permitted by section 10(2) of the Public Employment Relations Act, MCL 423.210(2), the parties had long agreed the members of the bargaining unit would be required to either become members of the labor organization or to pay a fee representing the costs associated with contract negotiation and administration. More than thirty years ago, the United States Supreme Court confirmed that it was lawful to negotiate and enforce such provisions under Michigan law. *Abood v Detroit Board of Education,* 431 US 209 (1977).

A union security clause is intended to prevent what are called "free riders." Without such provisions, a person who is a member of a bargaining unit may seek to receive all of the benefits of the collective bargaining agreement without providing the financial support necessary to bargain contracts or enforce them. As the Court noted in *Abood*:

> "The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. (Citation omitted) The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees..., union and nonunion," within the relevant unit. (Citation omitted) A unionshop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that

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> employees might otherwise have to become "free riders" - to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."

431 US 221-222.

2.

On December 11, 2012, the Michigan Legislature adopted what became 2012 PA 349 (given the misnomer of "Freedom to Work."). This statute amended section 10(2) of PERA and made union security provisions unlawful. However, the statute, by its terms, was not effective until March 27, 2013. In order to avoid a conflict with the Impairments Clause of the Fifth Amendment to the United States Constitution and Article I section 10 of the Michigan Constitution, the Act expressly permitted parties to retain and enforce union security provisions which are in effect prior to March 27, 2013. Section 10(5), as amended, states:

> "An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date of the amendatory act that added this subsection."

In short, union security provisions in effect on March 27, 2013 may be enforced until they expire.

3.

The Taylor Federation of Teachers and the Board of Education both recognized the value of labor peace and the importance of avoiding strife within a bargaining unit. Both these parties understood that it was not helpful to have "free riders" who would take advantage of the collective bargaining agreement while not supporting the union which negotiated it. This

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promotes disharmony in the bargaining unit and among employees. It causes friction between those who pay and those who do not pay.

These parties elected to avoid this concern by adopting two contracts which, together, promote labor-management collaboration and which contribute to resolving the Board's financial challenges. Teachers gave up a considerable part of their salary and other financial emoluments of employment. And the Board agreed to stabilize the bargaining relationship by approving a general contract of five years duration and a union security contract of ten years duration. These agreements will, it is expected, help resolve the financial problems facing the School district and will avoid internecine struggle between dues payers and free riders.

The Union Security agreement will maintain the obligation to either become a union member or pay a "fair share" fee. However, no employee is required to be a union member; they may pay the Union only that portion of dues which represents the cost of contract negotiation and administration. The method for determining these costs is well known. See e.g., *Lehnert v Ferris Faculty Ass'n,* 500 US 507, 519 (1991) (method for allocating costs chargeable to non members).

The proposals were submitted for ratification to the membership of the labor organization and the members of the Board of Education. Plaintiffs were entitled to oppose the proposed contract, to vote against it and encourage others to do so and may have done so. However, their view did not prevail. The membership of the Taylor Federation of Teachers approved the new agreements by a wide margin and by the Board of Education approved the agreements without dissent.

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## Argument

### Introduction

A. Summary of Argument

Represented by the Mackinac Center Legal Foundation, Plaintiffs initiated this action on February 29, 2013. The Mackinac Center has been a leading proponent of "Right to Work" legislation and supported the adoption of 2012 PA 349. The Center accompanied the filing of this suit with substantial publicity; it issued both print and video press releases and held a news conference before any of the Defendants had been served. The political nature of this complaint is apparent from the videos posted in the Mackinac Center website. http://www.mackinac.org/18331

The complaint contains three counts. Count I asserts that the union security provision is unlawful because the term is ten years while the other provisions of the collective bargaining agreement are five years. Count II asserts that the union security contract lacks consideration. Count III claims that the Taylor Board of Education cannot bind its successors by agreeing to a contract which cannot be altered. Plaintiffs ask that the Union Security contract be declared void.

B. Summary of Argument

Plaintiffs lack standing to challenge the validity of a contract to which they are not a party. Assuming, for argument, that they are third party beneficiaries, their sole right is to enforce the contract to obtain benefits provided by the agreement; Plaintiffs do not make such a request.

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In reality, Plaintiffs just do not approve of the contract which the actual parties bargained and which members ratified with overwhelming support; which the Board of Education approved unanimously.

Further, the Court lacks jurisdiction over all of Plaintiffs' various objections to provisions of the contract. The Michigan Employment Relations Commission has exclusive jurisdiction with regard to the application and interpretation of the Public Employment Relations Act, MCL 423.201 et seq. Plaintiffs cannot use this forum to assert violations of that statute.

C. Plaintiffs Lack Standing

1.

Plaintiffs lack standing to challenge the terms of the collective bargaining agreement because they are not parties to it. See *Wise v Civil Service Commission*, 2007 Mich App LEXIS 1996:

> "We first find that petitioner is not a party to the collective bargaining agreement. The collective bargaining agreement was made between the MCO and the MDOC. Barron's Law Dictionary (1984) defines "party" as "a person or entity that enters into a contract, lease, deed, etc." Black's Law Dictionary (8th ed) defines "party" as "[o]ne who takes part in a transaction <<a party to the contract>." Random House Webster's College Dictionary (2001) defines "party" in relevant part as "a person or group that participates in some action, affair, or plan" or as "a signatory to a legal instrument." Petitioner did not negotiate, sign, or otherwise personally enter into the collective bargaining agreement. She is therefore not a "party" to it. See also, *Markarian v Roadway Express, Inc,* 56 Mich App 43, 44; 223 NW2d 356 (1974) (holding that the plaintiff-employee was "not per se a party" to the collective bargaining agreement between his employer and his union, although he might have an independent action against his employer)."

Non parties may not challenge the validity of a contract or assert that the contract has been breached. *First Security Savings Bank v Aitken,* 226 Mich App 291, 306 (1997), *reversed*

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*on other grounds*, *Smith v Globe Life Ins Co*, 460 Mich 446, (1999). Nor can non parties seek to reform a contract. *Dokho v Jablonowski*, 2012 Mich App LEXIS 2253.

2.

In the labor context, non parties are strictly limited with regard to challenging matters arising under a collective bargaining agreement. Non parties may not challenge the decision of an arbitrator or attempt to have it vacated. So a grievant may not complain that an arbitrator was wrong or that the decision was incorrect; they are not a party to the collective bargaining agreement and have no independent rights under it.

The federal courts have rejected the standing of individuals to challenge actions arising under collective bargaining agreements.

> "The plaintiffs lack standing to enforce the arbitration award, however, because when employees are represented by a union they are not parties to either the collective bargaining agreement or any union-company arbitration. Martin, 911 F.2d at 1244 . They therefore generally cannot challenge, modify, or confirm the award in court."

*Cleveland v Porca Co*, 38 F3d 289, 206-297 (CA7, 1994)

Individuals may not seek to enforce a right which is not "personal to the individual" as opposed to a right which is possessed by the bargaining unit as a whole. *Brown v Sterling Aluminum Products Corp*, 365 F2d 651, (CA8, 1966), *cert den* 386 US 957 (1967)

> "However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant, even if such discussion were required by the existing collective bargaining agreement. Section 159(a) of the Act designates the representatives selected by a majority of the employees in a unit, which in most cases would be a Union, to "be the exclusive elected representatives of all the employees in that unit for the purpose of collective bargaining."

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And, "It is the Union alone that has the right to bargain with management on these broad policy issues." *Brown, id.*, citing *May Department Stores Co v NLRB*, 326 US 376 (1945).

Individuals may not challenge the award of an arbitrator. *Katir v Columbia University,* F3d 23 (1994) (If there is no claim that the union breached its duty of fair representation, an individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties). Nor may an individual seek confirmation of an award. *Martin v Youngstown Sheet & Tube Co*, 911 F2d 1239 , 1244 (CA7, 1990) (Employees represented by a union are not parties to the collective bargaining agreement or any union-company arbitration. (Citation omitted) Generally, then, they cannot challenge, modify, or confirm the award in court).

3.

Plaintiffs are not parties to this agreement. They did not formulate it. They did not bargain it. Instead, they are, at most, third party beneficiaries. As such, their right is limited to securing the benefits of the agreement. They have no standing to assert that the contract is void.

D. Each of Plaintiffs' Claims Is Without Merit

1. The Court Lacks Jurisdiction With Regard to Count I: The Union Security Agreement

(a)

(i) Plaintiffs contend that the collective bargaining agreement violates MCL 423.215b, section 15b of PERA. With respect, this Court lacks jurisdiction to decide the question. The Michigan Employment Relations Commission has exclusive jurisdiction with respect to violations of PERA:

> "The PERA governs labor relations in public employment. It imposes a duty of collective bargaining on public employers, unions, and their agents, MCL 423.210; MSA 17.455(10). Violations of § 10 of the PERA are deemed unfair

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> labor practices under MCL 423.216; MSA 17.455(16) remediable by the Michigan Employment Relations Commission. We have interpreted § 16 as vesting the MERC with exclusive jurisdiction over unfair labor practices."

*St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 550 (1998)

Plaintiffs' forum, if they have one, is MERC and not this Court. A Circuit Court may not adjudicate alleged violations of PERA:

> "Clearly, the PERA is the exclusive remedy for any unfair labor practice charge, and the MERC has exclusive jurisdiction to adjudicate such charges. A plaintiff cannot obtain another remedy by framing the unfair labor practice as a different species of common-law or statutory claim invoking the jurisdiction of a different tribunal. If the allegations forming the plaintiff's cause of action implicate an unfair labor practice question, the claim is barred by the MERC's exclusive jurisdiction. Here, the association's claim that defendant must provide the internal affairs file raises a question of defendant's obligation to provide the union with requested information. MCL 423.210(1)(e); MSA 17.455(10)(1)(e). Because the association's claim, if meritorious, clearly constitutes an unfair labor practice by the employer, its resolution falls within the MERC's exclusive jurisdiction. The trial court therefore erred in ordering defendant to release these documents."

*Kent Co Deputy Sheriffs' Assoc v Kent Co Sheriff*, 238 Mich App 310, 325; 605 NW2d 363 (2000), *aff'd in part and remanded in part on other grounds* 463 Mich 353 (2000).

(ii)

The exclusive jurisdiction of the Michigan Employment Relations Commission extends even to actions brought by the actual parties to the agreement. So in *Mich AFSCME Council 25 & Loretta Bates v Livingston County Rd Comm'n & Michael R Kluck*, 2007 Mich App LEXIS 2544 (2007) the Court of Appeals affirmed the dismissal of an action brought by a union and a member alleging breach of the collective bargaining agreement. The Court reasoned that the action was "squarely within the purview of the MERC" and a circuit court could not intercede.

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The Supreme Court has drawn a bright line with regard to the jurisdiction of the Circuit Court. Only MERC may adjudicate matters arising under the Public Employment Relations Act. This was explained in *Demings v Ecorse*, 423 Mich 49 (1985) where the Court noted the sole exception to the Commission's exclusive jurisdiction; that a Circuit Court had concurrent jurisdiction with MERC with regard to one class of matters, i.e., those asserting that the Union breached its duty of fair representation. However, that is the only exception; MERC has complete authority with regard to all other matters.

(b)

Even if the Court had jurisdiction, MCL 423.215b does not apply here. Plaintiffs distort the statute to try to find a limitation which does not exist. This provision is the codification of 2011 PA 54. This clause has nothing to do with the length of a collective bargaining agreement. Rather, the statute applies in the *hiatus between contracts*; it prescribes what happens after a contract expires and before it is replaced. No part of this provision limits the length of a collective bargaining agreement.

(c)

The Michigan Employment Relations Commission has held that provisions of a collective bargaining agreement may expire at different times and that one term may survive the expiration of others. In *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528, the Commission rejected the employer's argument that a 10-year waiver agreement should be declared invalid because it extended past the term of the contract in which it was included. In so holding, the Commission in that case noted that it was not the Commission's role to reform an agreement reached by the parties to a collective bargaining relationship or to alter the

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bargain that they had intentionally reached, even if the agreement has adverse consequences for one of the parties.

In *Ann Arbor*, the Employer had agreed to waive its right to bargain regarding pension benefits. The contract clause was of ten years duration. It extended beyond the expiration of the collective bargaining agreement in which it was located. MERC held the provision valid:

> "We are not authorized by PERA to police the content of agreements to redress imbalances of bargaining power between the parties. Nor are we willing to hold that parties may not enter into a bargaining waiver of ten years duration without violating the Act.
>
> "As the Employer points out, we have held that the effect of a waiver contained in a collective bargaining agreement does not extend past the expiration of that agreement. *Capac Community Schools,* 1984 MERC Lab Op 1195; Wayne County, 1985 MERC Lab Op 168. In these cases, however, the contractual waiver had no explicit expiration date. We refused as a matter of law to presume that the parties intended their waiver to extend past the expiration of the document in which it was found. Here, however, the parties clearly and unmistakably agreed to a ten year pension moratorium. While the scope of this agreement may be in dispute, the length of it is not."

The waiver was enforceable although it expired after the remainder of the collective bargaining agreement. And it was enforceable although it was ten years in duration. MERC has rejected exactly what Plaintiffs are arguing here.

*Ann Arbor* was reaffirmed in *City of Taylor*, 23 MPER ¶ 33:

> "As the Commission noted in *Ann Arbor Fire Fighters*, it is not the Commission's role to reform an agreement reached by parties to a collective bargaining relationship or to alter the bargain they intentionally reached, even if this agreement has bad consequences for one of the parties or for the bargaining unit as a whole."

MERC has routinely approved contracts of long duration. See e.g., *City of Durand Police Department,* 2000 MERC Lab Op 135 (five-year contract).

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Plaintiffs contentions have been rejected by the agency responsible for interpreting the statute. This Court should find that it lacks jurisdiction to review these claims but, if it had jurisdiction, that the claims are without merit.

2. Count II: Consideration and MCL 423.214

(a) Consideration

Despite not being parties to the agreement, Plaintiffs mount a collateral attack on the Union Security Agreement by contending that the contract lacks consideration. The Court should decline the invitation to examine the consideration or determine if it is sufficient.

> "It has often been said that the courts will not inquire into the adequacy of the consideration. *Levitz v. Capitol Savings & Loan Co.*, 267 Mich 92. When 2 competent parties, through a process of give and take, reach an agreement it can be presumed that the mutual promises were considered adequate. *Kennedy v. Shaw*, 43 Mich 359; Van *Norsdall v. Smith*, 141 Mich 355; *Olson v. Rasmussen*, 304 Mich 639; 12 Am Jur, p 614."

*Harris v Chain Store Realty Bond & Mortg Corp*, 329 Mich 136, 145 (1950)

Moreover,

> "Mere inadequacy of consideration, not accompanied by other elements of bad faith, will not warrant cancellation of a contract, unless so inadequate as to furnish convincing evidence of fraud. (*Van Norsdall v. Smith,* 141 Mich 355), or unless so grossly inadequate as to shock the conscience of the court ( *Hake v. Youngs*, 254 Mich 545)."

*Wroblewski v Wroblewski*, 329 Mich 61, 67 (1950).

See also *Moffit v Sederlund*, 145 Mich App 1, 11 (1985) (Courts will not ordinarily inquire into the adequacy of consideration and rescission of the contract for inadequacy of consideration will not be ordered unless the inadequacy was so gross as to shock the conscience of the court.

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Simply put, the actual parties to the agreement found the consideration for each contract to be sufficient. This Court should not go behind their understanding of the value of the contracts.

(b) MCL 423.214

(i) Plaintiffs rely on MCL 423.214 to assert that a collective bargaining agreement may not be longer than three years. First, were that true, the Court would lack jurisdiction as the matter would be within the purview of the Michigan Employment Relations Commission. However, second, the statute is utterly unrelated to the ability of parties to agree to the duration of a contract.

MCL 423.214 establishes what is referred to as the "election bar" and the "contract bar." It states, in pertinent part:

> "Sec. 14. (1) An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The commission shall determine who is eligible to vote in the election and shall promulgate rules governing the election. In an election involving more than 2 choices, if none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. An election shall not be directed in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties thereto if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later."

The "election bar" is intended to prevent a labor organization from filing multiple petitions for election within a short time frame. The statute prohibits an election to certify a labor organization more frequently than once per annum. It has nothing whatsoever to do with the duration of a collective bargaining agreement. See *Kingsley/Traverse City Adult Ed Consortium* 1988 MERC Lab Op 118 (MERC dismisses accretion petition filed three months

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after a consent election); *Traverse City Educ Ass'n v Traverse City Public Schools*, 178 Mich App 205 (1989) (reversing MERC direction of election where petition filed less than one year after previous election was conducted).

The "contract bar" prohibits an election in a bargaining unit for the first three years of a collective bargaining agreement. See *County of Washtenaw* 19 MPER ¶ 14 (2006) (election petition dismissed as untimely as filed within contract bar).

(ii)

Parties may agree to a collective bargaining agreement of any duration. See *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528 (agreement of ten years duration). However, the contract is only a bar to an election during the first three years of its existence. The reasoning behind this doctrine is that employees should have the choice to select a new representative or no representative; that a contract should not act as a bar indefinitely. The National Labor Relations Board has applied this doctrine since at least 1953. *American Seating Co*, 106 NLRB 250, 32 LRRM 1439 (1953). It was made a part of the Michigan statute when it was adopted in 1965. However, no part of MCL 423.214 limits the right of parties to approve an agreement of any duration. The statute is designed only to prevent multiple elections within a short period of time.

3. Count III: Binding Future Boards

Plaintiffs seem to contend that a school board cannot enter into a contract with a duration greater than a single year. They assert that a legislative body may not bind another sitting of a legislative body through contract. This must be news to any municipality; boards, commissions, councils regularly enter into contracts which will expire long after the legislative terms of the elected or appointed members. The Plaintiffs' contention belies logic.

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First, Plaintiffs lack standing to raise the question. None are members of the Board of Education. Second, Plaintiffs's contention belies the decision of the Supreme Court in *Studier v Mich Pub Sch Emples Ret Bd*, 472 Mich 642 (2005). The Court made it clear that a legislative body may bind itself and its successors through the making of contracts.

> "Although this venerable principle that a legislative body may not bind its successors can be limited in some circumstances because of its tension with the constitutional prohibitions against the impairment of contracts, *thus enabling one legislature to contractually bind another*, (Citation omitted) such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments, id. at 874-875. A necessary corollary of these limitations that has been developed by the United States Supreme Court, and followed by this Court, is the strong presumption that statutes do not create contractual rights. *Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co*, 470 U.S. 451, 465-466; 105 S. Ct. 1441; 84 L. Ed. 2d 432 (1985); In re Certified Question *(Fun 'N Sun RV, Inc v Michigan)*, 447 Mich. 765, 777-778; 527 N.W.2d 468 (1994)" (emphasis added)

*Studier v Mich Pub Sch Emples Ret Bd*, 472 Mich 642, 660-661 ( 2005)

The Plaintiffs' contention would mean that a Board of Education might not enter into a contract longer than a single school year. There is no authority for the proposition nor could there be. Municipalities routinely enter into agreements with vendors that last many years. They enter into agreements with bonding companies that last decades. It is specious to suggest, as do Plaintiffs, that a municipality cannot enter into contracts with durations greater than a single year.

E. The Parties' Discretion to Bargain

Plaintiffs' actual complaint is that they do not approve of the collective bargaining agreement which was negotiated by these parties. Artful pleading aside, Plaintiffs appear to assert that the Union breached its duty of fair representation by bargaining a contract that they do not like. But they have plead no facts which support their argument nor could they.

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1.

The Court is entitled to look behind the words of the complaint to see what Plaintiffs are actually claiming. The Court is not bound by the labels a party places on their action:

> A party's choice of label for a cause of action is not dispositive:
>
> > "We are not bound by the choice of label because to do so "would exalt form over substance." *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). A party cannot avoid the dismissal of a cause of action through artful pleading. *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). The gravamen of a plaintiff's action is determined by examining the entire claim. *Id.* The courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim. *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987)."

*Norris v Police Officers*, 292 Mich App 574, 582 (2011)

2.

(a)

A union has a duty of fair representation. However, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith." *Goolsby v Detroit*, 419 Mich 651, 661 (1984). A union's duty of fair representation applies to the bargaining context but so does its broad discretion:

> "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation [citations omitted]. 'By its selection as bargaining representative it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.' *Wallace Corp v Labor Board*, 323 U.S. 248, 255 (1944). The exclusive agents' obligation 'to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all those members, without hostility to any...and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co v Huffman*, 345 U.S. 330, 337-338." 375 U.S. 335, 342."

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*Bebensee v Ross Pierce Electric Corp*, 400 Mich 233, 245 (Mich 1977)

As our Court of Appeals stated in *Farmington Hills v Farmington Hills Police Officers Ass'n*, 79 Mich App 581, 589-590 (1977):

> "The public employment relations act (PERA) under which this agreement was made, accords broad authority to the designated representative. That act provides, in pertinent parts of sections 11 and 15, respectively, as follows: "Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer."

(b)

A collateral attack on the terms of a collective bargaining agreement is properly viewed as a claim that the union breached its duty of fair representation. As such, Plaintiffs have a duty to specifically plead allegations which, if true, demonstrate that the union somehow was arbitrary, discriminated or acted in bad faith. See, *Merdler v Board of Education*, 77 Mich App 740, 746-747 (1977). Plaintiffs have not. There are no allegations which contend that the bargain breached the union's duty of fair representation because it did not.

This contract was negotiated between parties acting in good faith. There was the recognition that the Taylor School district was in an economic crisis. Teachers agreed to accept a substantial reduction in compensation. In exchange, they parties got years of labor peace and stability. The membership of the Taylor Federation of Teachers was asked if it concurred. It did, by an overwhelming margin. The elected members of the Taylor Board of Education were asked if they concurred. They did, without dissent. The bargain, these parties said, was a fair one. And Plaintiffs have no basis to say otherwise.

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## Conclusion

Plaintiffs' claim is utterly without merit. Plaintiffs have no standing to assert that the contract is somehow void. Disputes regarding the meaning of provisions of the Public Employment Relations Act, MCL 423.201 et seq. are within the exclusive province of the Michigan Employment Relations Commission. And the contention that the duration of a contract is somehow limited is completely inconsistent with law and, indeed, common sense.

The Court should grant the Defendants summary disposition.

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May 9, 2013

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Source: NLRB Decisions > National Labor Relations Board > AMERICAN SEATING CO., 32 LRRM 1439 (N.L.R.B. 1953)

**32 LRRM 1439**
**AMERICAN SEATING CO.**
**National Labor Relations Board**

Case No. 7-CA-818

July 22, 1953

106 NLRB No. 44

**In re AMERICAN SEATING COMPANY [Grand Rapids, Mich.] and PATTERN MAKERS' ASSOCIATION OF GRAND RAPIDS, PATTERN MAKERS' LEAGUE OF NORTH AMERICA (AFL)**

## Headnotes

**REFUSAL TO BARGAIN Sec. 8(a)(5) ►54.717 ►54.855**

Collective bargaining contract which was held not to be a bar to election among craft unit of pattern makers covered by contract because of its unreasonably long duration likewise does not justify employer's failure to accord immediate and full statutory bargaining rights to union certified as bargaining agent for pattern makers



**REFUSAL TO BARGAIN Sec. 8(a)(5) ►24.751 ►54.717 ►62.693**

Craft workers who lawfully changed their bargaining agent are not bound by contract negotiated by them as principals through their old bargaining agent beyond time of new bargaining agent's certification. Contention that certification merely resulted in substitution of a new bargaining agent in place of the old one, with the substantive terms of the contract remaining unchanged, is rejected, since common law principles of agency do not control the relationship between an exclusive bargaining representative and employees which is created by statute

### Attorneys

William E. Rhodes, for the General Counsel; C. J. Riddering, George H. Roderick and Harry J. Kelley, of Grand Rapids, Mich., for the respondent; Gerald E. Noe, of Holly, Mich., and Vernon Will, of Grand Rapids, Mich., for the union

### Judge

Trial Examiner Ralph Winkler.

## BNA Digest

*Order: Cease and desist from refusing to bargain collectively with Pattern Makers as representative of employees in pattern makers' unit. Upon request, bargain collectively with Pattern Makers; post notice.*

## Opinion Text

[*Text*] "The facts in the case are undisputed. On September 20, 1949, following an election, the Board certified International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, (UAW-CIO), and its Local No. 135,

herein called the UAW-CIO, as bargaining representative of the Respondent's production and maintenance employees. On July 1, 1950, the Respondent and the UAW-CIO entered into a three year collective bargaining contract covering all employees in the certified unit. Shortly before the expiration of two years from the date of signing of the contract, Pattern Makers' Association of Grand Rapids, Pattern Makers' League of North America, AFL, herein called the Union, filed a representation petition seeking to sever a craft unit of pattern makers from the existing production and maintenance unit. Both the Respondent and the UAW-CIO opposed the petition, contending that their three year contract which would not expire until July 1, 1953 was a bar. In a decision issued on Septemper 4, 1952, the Board rejected the contention. [1] It held that, as the contract had already been in existence for two years, and as the contracting parties had failed to establish that contracts for three year terms were customary in the seating industry, the contract was not a bar during the third year of its term. Accordingly, the Board directed an election in a unit of pattern makers which the Union won.

"On October 6, 1952, the Board certified the Union as bargaining representative of the Respondent's pattern makers. Approximately 10 days later, the Union submitted to the Respondent a proposed

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collective bargaining agreement covering terms and conditions of employment for pattern makers to be effective immediately. The Respondent replied that it recognized the Union as bargaining representative of the pattern makers and that it was willing to negotiate or discuss subjects properly open for discussion, but that the existing contract with the UAW-CIO was still in full force and effect and remained binding upon all employees, including pattern makers, until its July 1, 1953 expiration date.

"There is no question raised as to the Board's power to direct an election upon its finding that the existing contract between the UAW-CIO and the Respondent was not a bar. [2] The parties differ, however, as to the effect to be given to the new certification resulting from this election. The Respondent contends that the certification of the Pattern Makers merely resulted in the substitution of a new bargaining representative for pattern makers in place of the old representative, with the substantive terms of the contract remaining unchanged. [3] In support of this position, the Respondent argues that the UAW-CIO was the agent of the pattern makers when it entered into the 1950 agreement with that organization, and that the pattern makers, as principals, are bound by that contract to the expiration date thereof, notwithstanding that they have changed their agent. The General Counsel, on the other hand, contends that the certification of the Pattern Makers resulted in making the existing contract with the UAW-CIO inoperative as to the employees in the unit of pattern makers.

"The Respondent's principal-agent argument assumes that common law principles of agency control the relationship of exclusive bargaining representative to employees in an appropriate unit. We think that this assumption is unwarranted and overlooks the unique character of that relationship under the National Labor Relations Act.

"Under the common law, agency is a consensual relationship. [4] On the other hand, the status of exclusive bargaining representative is a special one created and governed by statute. [5] 'Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining * * *.' [6] A duly selected statutory representative is the representative of a shifting group of employees in an appropriate unit—which includes not only those employees who approve such relationship, but also those who disapprove and those who have never had an opportunity to express their choice. [7] Under agency

**Page 1441**

principles, a principal has the power to terminate the authority of his agent at any time. [8] Not so in the case of a statutory bargaining representative. [9] Thus, in its most important aspects the relationship of statutory bargaining representative to employees in an appropriate unit resembles a political rather than a private law relationship. [10] In any event, because of the unique character of the statutory representative, a solution for the problem presented in this case must be sought in the light of that special relationship rather than by the device of pinning labels on the various parties involved and applying without change principles of law evolved to govern entirely different situations.

"The National Labor Relations Act provides machinery for the selection and change of exclusive bargaining representatives. [11] If, after the filing of a petition by employees, a labor organization or an employer, and the holding of a hearing, the Board is convinced that a question of representation exists, it is directed by statute to conduct an election by secret ballot and certify the results thereof. [12] The Act does not list the situations in which a 'question of representation affecting commerce exists.' [13] That has been left to the Board to decide. [14] One of the problems in this connection arises from the claim that a collective bargaining contract of fixed term should bar a new election during the entire term of such contract. In solving this problem, the Board has had to balance two separate interests: the interest of employees and society in the stability that is essential to the effective encouragement of collective bargaining, and the sometimes conflicting interests of employees in being free to change their representatives at will. [15] Reconciling these two interests in the early days of the Act, the Board decided that it would not consider a contract of unreasonable duration a bar to an election to determine a new bargaining representative. The Board further decided that a contract of more than one year was of unreasonable duration and that it would direct an election after the first year of the existence of such a contract. [16] In 1947, in the further interest of stability, the Board extended from one to two years the period during which a valid collective bargaining contract would be considered a bar to a new determination of representatives. [17] Contracts for periods longer than two years may be a bar, if such longer term contracts are customary in the industry, or as more recently stated, if 'a substantial part of the industry is covered by contracts of a similar term.' [18]

"These contract bar rules have been affirmed many times and have become an established part of the law of labor relations. [19] They received the approval of

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Congress when it amended the Act in 1947, [20] and have been 'as it were, written into the statute. [21] Therefore, when the Respondent and the UAW-CIO entered into their three year bargaining contract in 1950, they were on notice that, after the first two years of its term, unless it could be shown that longer term contracts were customary in the industry, the contract would not prevent the selection of a new bargaining representative for any group of employees who might constitute an appropriate unit. [22] Neither the Board nor the Courts have decided, however, the effect a new certification has upon an existing collective bargaining contract which has been held not a bar to a new determination of representatives because it is of unreasonable duration. [23]

"In 1952, the Board decided that the Respondent's pattern makers, who constitute one of the most skilled craft groups, might, after two years of experience as part of a plant-wide unit of approximately 1500 employees, if they so desired, constitute a separate appropriate unit. Apparently dissatisfied with their representation by the UAW-CIO, all six pattern makers voted for a separate unit to be represented by the Pattern Makers, which is the labor organization that traditionally represents pattern makers in industry. The Board thereupon certified the Pattern Makers as bargaining representative for those employees. Although the certification of October 6, 1952, gave the Pattern Makers immediate status as

exclusive representative for the purposes of collective bargaining 'in respect to rates of pay, wages, and hours of employment,' the Respondent would qualify the Pattern Makers' authority as to these subjects by adding—after July 1, 1953. If the Respondent's contention is sound, a certified bargaining representative might be deprived of effective statutory power as to the most important subjects of collective bargaining for an unlimited number of years as the result of an agreement negotiated by an unwanted and repudiated bargaining representative. There is no provision in the statute for this kind of emasculated certified bargaining representative. Moreover, the rule urged by the Respondent seems hardly calculated to reduce 'industrial strife' by encouraging the 'practice and procedure of collective bargaining,' the declared purpose of the National Labor Relations Act, as amended.

"The purpose of the Board's rule holding a contract of unreasonable duration not a bar to a new determination of representatives is the democratic one of insuring to employees the right at reasonable intervals of reappraising and changing, if they so desire, their union representation. Bargaining representatives are thereby kept responsive to the needs and desires of their constituents; and employees dissatisfied with their representatives know that they will have the opportunity of changing them by peaceful means at an election conducted by an impartial government agency. Strikes for a change of representatives are thereby reduced and the effects of employee dissatisfaction with their representatives are mitigated. But, if a newly chosen representative is to be hobbled in the way proposed by the Respondent, a great part of the benefit to be derived from the no-bar rule will be dissipated. There is little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period of time.

"We hold that, for the reasons which led the Board to adopt the rule that a contract of unreasonable duration is not a bar to a new determination of representatives, such a contract may not bar full statutory collective bargaining including the reduction to writing of any agreement reached, as to any group of employees in an appropriate unit covered by such contract, upon the certification of a new collective bargaining representative for them. [24] Accordingly, we find that by refusing on and after October 16, 1952, to bargain with the Pattern Makers

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concerning wages, hours and other working conditions for employees in the unit of pattern makers, the Respondent violated Section 8(a)(5) and (1) of the Act.

"In making the above finding, we have not relied on the Trial Examiner's interpretation of Section 8(d). However, we also agree with the Trial Examiner that, for the reasons stated by him, Section 8(d) is 'inapplicable upon an intervening certification of the Board,' thus leaving the Sands [25] rule in full vitality. For this reason, too, we find that the Respondent's refusal to discuss terms and conditions of employment violated Section 8(a)(5) and (1) of the Act."

[*Text from trial examiner's report referred to above*] "The portion of Section 8(d), which provides that paragraphs (2), (3), and (4) do not require a party to a contract for a fixed term to bargain or agree concerning contract modifications to become operative before the contract itself permits, changes the rule of *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332, 342 [4 LRR Man. 530]. The doctrine of the Sands case was that 'an employer was under a duty, upon request, to bargain with the representatives of his employees as to terms and conditions of employment whether or not an existing collective bargaining agreement found the parties as to the subject matter to be discussed.' *N.L.R.B. v. Jacobs Manufacturing Company*, 196 F.2d 680, 683 [30 LRRM 2098] (C.A. 2). As Section 8(d) also provides that paragraphs (2), (3), and (4) do not apply when there is an intervening certification, one possible construction is that by thus removing the statutory teeth from the Section in such a situation, Congress implied that Section 8(d)(1) also does not apply and thereby manifested a Congressional assumption that an agreement does not continue upon an intervening certification—for, if agreements

do continue in such circumstances, there is as much need for 8(d)(2), (3), and (4) as in any other contract situation. The other possible construction is, of course, by a converse application of *inclusio unius est exclusio alterius,* that Section 8(d)(1) was intended to operate, a construction which then would indicate Congressional understanding that contracts remain effective despite an intervening certification. If the first interpretation be accepted, the Respondent was obviously obliged to negotiate with the Pattern Makers concerning all subjects of collective bargaining, there being no contract question under this hypothesis. But even if the second construction be made and it accordingly be assumed that the July 1950 agreements do continue, the Respondent would still be obliged to bargain immediately concerning present changes in terms and conditions of employment; for that portion of Section 8(d) which changes the Sands doctrine is, by its own terms, 'inapplicable upon an intervening certification pf the Board,' thus leaving the Sands rule in full vitality under the second hypothesis stated."

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[1] Not reported in printed volumes of Board decisions.

[2] The Respondent contends that the Board's bar rules are only "procedural rules" and refers to *N.L.R.B. v. Grace Company*, 184 F.2d 126, 129 [26 LRRM 2536] (C.A. 8), where the court said:

"The Board's rule that the existence of a valid written and signed bargaining agreement * * * is a bar to a certification for a different representation, if applicable to the facts in this case, is a procedural rule which the Board in its discretion may apply or waive as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements."

The court did not explain what it meant by "procedural" which is not a word of art. *Kring v. Misssouri*, 107 U.S. 221, 231. The court in the Grace case sustained the Board's finding that a contract that had not been reduced to writing and signed before the filing of a rival petition was not a bar to a new election. In this connection, the court cited *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 [7 LRR Man. 291], where the Supreme Court held that an employer's refusal to sign a contract embodying the terms of collective bargaining agreement constituted an unfair labor practice. The court did not decide the effect of a new certification upon an existing contract.

[3] In its brief, the Respondent concedes that the procedural aspects of the existing contract grievance procedure, the number of union stewards, and union security might be required subjects of negotiation with the newly certified bargaining representative.

[4] "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement.

Agency S/S 1 (1933).

[5] *Fay v. Douds*, 172 F.2d 720, 724 [23 LRRM 2356] (C.A. 2).

[6] Section 9(a) of the Act.

[7] The nature of a statutory representative's constituency is well illustrated by the facts in this case. In the 1949 election to select a bargaining representative for the Respondent's production and maintenance employees, including pattern makers, there were three contending unions: the UAW-CIO, Upholsterers' International Union of North America, AFL, herein called the Upholsterers, and United Furniture Workers of America, CIO, herein called the Furniture Workers. At the first election, of approximately 1488 eligible voters, 1293 voted. Of these, 569 voted for the UAW-CIO, 238 voted for the Upholsterers, 416 voted for the Furniture Workers, 65 voted against all participating labor organizations, 1 voted under challenge and 4 cast void ballots. As this election was indecisive, a run-off election was held with only the Furniture Workers and the UAW-CIO on the ballot. In this second election, 594 employees voted for the Furniture Workers and 706 voted for the UAW-CIO. There were also 9 void ballots. As the UAW-CIO received a majority of valid votes cast in the run-off election, it was certified as bargaining representative of all employees in the plant-wide unit. It is interesting to observe that before the run-off election was held, the Pattern Makers moved to intervene in order to urge that a separate unit of pattern makers be established. The motion was denied because the Pattern Makers' evidence of interest was procured after the original hearing. The United Boat Service Corporation, 55 NLRB 671 [14 LRR Man. 48]. As the election was secret, it is not known how the handful of pattern makers voted. But the Respondent and the UAW-CIO, when they entered into their bargaining contract in 1950, must have been aware of the pattern maker interest in their own craft union. It is also significant that this interest was sustained for the two years of

representation by the UAW-CIO, as evidenced by the fact that in the election held in 1952, all the pattern makers voted for representation by the Pattern Makers.

[8] Restatement, Agency S/S 118(b) (1933).

[9] *N.L.R.B. v. Brooks*, — F.2d—(C.A. 9). 32 LRRM 2118; *N.L.R.B. v. Century Oxford Mfg. Co.*, 140 F.2d 541 [13 LRR Man. 819] (C.A. 2): *N.L.R.B. v. Botany Worsted Mills*, 133 F.2d 876 [11 LRR Man. 780] (C.A. 3); *N.L.R.B. v. Appalachian Electric Power Co.*, 140 F.2d 217 [13 LRR Man. 750] (C.A. 4); contra, *Mid-Continent Petroleum Corp. v. NLRB*, — F.2d — (C.A. 6), 32 LRRM 2127.

[10] Weyand, Majority Rule in Collective Bargaining, 45 Col. L. Rev. 556, 561 (1945); Note, 38 Mich. L. Rev. 516, 521 (1940).

[11] Section 9(c).

[12] Section 9(c)(1).

[13] See NLRB, Sixteenth Annual Report (1951), pp. 59-84; NLRB. Fifteenth Annual Report (1950), pp. 34-36, 60-77.

[14] Except that no election may be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election has been held. Section 9(c)(3). Neither may any investigation be made unless certain filing requirements are satisfied. Section 9(f), (g) and (h).

[15] General Motors Corporation. 102 NLRB No. 115 [31 LRRM 1344]; The Trailer Company of America, 51 NLRB 1106 [12 LRR Man. 288].

[16] E.g., Columbia Broadcasting System, Inc., 8 NLRB 508 [2 LRR Man. 488]; The Riverside and Fort Lee Ferry Company, 23 NLRB 493 [6 LRR Man. 319]: Wichita Union Stockyards Company, 40 NLRB 369 [10 LRR Man. 65].

Before deciding on the contract bar rule, the Board moved tentatively in the direction of conducting elections whenever employees indicated that they desired to change bargaining representatives, notwithstanding the existence of a collective bargaining contract. See New England Transportation Company, 1 NLRB 130, 138 [1 LRR Man. 97], where the Board said: "The whole process of collective bargaining and restricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function." In making this statement, the Board relied on a similar statement of the National Mediation Board. National Mediation Board, First Annual Report 23-24 (1935). However, collective bargaining contracts in the railroad industry are terminable at any time upon 30 days notice, unlike contracts in other industries which are usually for fixed terms. See Rice. The Legal Significance of Labor Contracts under the National Labor Relations Act, 37 Mich. L. Rev. 693, 720 (1939). In Swayne & Hoyt Ltd., 2 NLRB 282, 287 [1 LRR Man. 99], after repeating the above quotation from the New England Transportation case, the Board added: "Consequently, * * * whichever organization is chosen an representative of the employees for the purposes of collective bargaining will be free to continue the existing agreement, to bargain concerning changes in the existing agreement, or to follow the procedure provided therein for its termination." The New England Transportation approach was abandoned in favor of the contract bar rule. See Boston Machine Works Company, 89 NLRB 59, 62 [25 LRRM 1508].

[17] Reed Roller Bit Company, 72 NLRB 927 [19 LRRM 1227].

[18] General Motors Corporation, 102 NLRB No. 115 [31 LRRM 1344].

[19] E.g., Puritan Ice Company, 74 NLRB 1311 [20 LRRM 1268] (1947); Schaeffer Body, Inc., 78 NLRB 1247 [22 LRRM 1377] (1948); International Paper Company, 80 NLRB 751 [23 LRRM 1134] (1948); Sanson Hosiery Mills, Inc., 84 NLRB 654 [24 LRRM 1314] (1949); Association of Motion Picture Producers, Inc., 88 NLRB 521 [25 LRRM 1349] (1950).

[20] Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 25; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 50.

[21] *Fay v. Douds*, 172 F.2d 720, 724 [23 LRRM 2356] (C.A.2); see *NLRB v. Efco Manufacturing, Inc.*, — F.2d — (C.A. 1), 32 LRRM 2001; *N.L.R.B. v. Geraldine Novelty Co.*, 173 F.2d 14, 17-18 [23 LRRM 2483] (C.A. 2); *Iob v. Los Angeles Brewing Co.*, 183 F.2d 398, 404 [26 LRRM 2401] (C.A. 9); *N.L.R.B. v. Grace Company*, 184 F.2d 126, 129 (C.A. 8) [26 LRRM 2536].

[22] Compare *N.L.R.B. v. J. I. Case Company*, 134 F.2d 70, 72 [12 LRR Man. 538] (C.A.7),

aff'd 321 U.S. 332 [14 LRR Man. 501], where the Court said:

"Contracts must be understood as having been made not only with reference to existing legislation but also with reference to the possible exercise of any rightful authority of the Government, and no obligation of existing contracts may be invoked to defeat that authority."

[23] We do not consider *Triboro Coach Corporation v. N.Y.S.L.R.B.*, 286 N.Y. 314 [8 LRR Man. 1131] (1941) as having passed upon this precise issue. In that case, the New York Court of Appeals, by a four to three vote, set aside a certification of representatives issued by the New York State Labor Board to Union A after an election, upon the ground that a valid contract between the employer and Union B existed. The court rejected the finding of the New York Board that the contracting parties had terminated their agreement. It also found that Union A, the rival union, had not filed its representation petition in proper time. The New York court never reached the question, posed in the present case, of the effect upon an existing contract of the valid selection of a new labor organization as bargaining representative.

Nor do we consider that Congress in passing the 1947 amendments decided the issue in this case. As set out by the Trial Examiner, the legislative history is ambiguous at best.

[24] See Pacific Greyhound Lines, 22 NLRB 111. 141 [6 LRR Man. 189] (Chairman Madden's opinion). The Respondent assumes at least partial defeasance of the existing contract in acknowledging that such matters as union security, contract grievance procedure and the number of stewards may be required subjects of collective bargaining with the Pattern Makers.

[25] *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332, 342 [4 LRR Man. 530].

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- End of Case -

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ISSN 2156-2849

In the Matter of:
ANN ARBOR FIRE FIGHTERS ASSOCIATION LOCAL 1733, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
Respondent-Union,
-and-
CITY OF ANN ARBOR,
Charging Party.

Case No. CU88 F-34

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**II. Procedure and Evidence**
**D. Evidence**
**1. Admissibility**

[1] Documents Showing History of Parties' Dispute.
On exceptions, Commission reverses evidentiary holding of ALJ to admit five documents showing lengthy history of parties' dispute dating back several years. ALJ's exclusion had been based on fact that documents involved events taking place more than 6 months before filing of ULP charge; statute of limitations was ALJ's rationale. Commission holds such evidence of earlier events may be used to shed light on "true nature of acts," such as respondent's motive where such motive is an issue in the case, as here. (PERA)

**I. Commission Jurisdiction and Coverage of Act**
**A. Jurisdiction**
**2. Contract Dispute**

[2] Content of Contract.
Commission is not authorized by PERA to police content of agreements to redress imbalances of bargaining power between parties. Commission also holds that parties may include lengthy waivers of bargaining rights without violating PERA. (PERA)

**VII. Employer Unfair Labor Practices**
**H. Refusal to Bargain Not Found**
**4. Contract**
*d)* **Miscellaneous**

[3] Content of Contract.
[*Same text as headnote No. 2 above*]

[*Headnotes continued on next page*]





**VII. Employer Unfair Labor Practices**
**G. Refusal to Bargain Found**
**6. Defenses**
*m)* **Waiver of Bargaining Rights**

[4] Waiver with Explicit Duration Beyond Expiration of Contract.
In previous cases where parties' contracts contained explicit waivers with unspecified duration, Commission held them to expire at date that agreements expired. Here, parties clearly and unmistakably agreed to 10-year pension moratorium as part of shorter contract, and Commission finds explicit duration beyond expiration of contract is valid. (PERA)

**VII. Employer Unfair Labor Practices**
**H. Refusal to Bargain Not Found**
**4. Contract**
*d)* **Miscellaneous**

[5] Vagueness Rejected as Grounds for Voiding Clause.
Parties included in contract explicit 10-year moratorium on negotiating any subject which would affect pension rights of employees. Employer argued clause was so broad and vague as to preclude up to 28 different contract clauses from being renegotiated during such 10-year interval. Commission rejects vagueness as grounds for voiding such clause, restricting itself to statutory task of determining bargaining rights and obligations rather than reformation of parties' contract. (PERA)

**I. Commission Jurisdiction and Coverage of Act**
**A. Jurisdiction**
**2. Contract Dispute**

[6] Contract Interpretation Necessary to Determine Waiver Issue.
While MERC may not properly enforce and interpret collective bargaining agreements generally, in certain situations where issue revolves around purported waiver of bargaining rights, contract interpretation becomes required to determine whether ULP has been committed. Commission's standard for interpreting such waivers is whether they are clear and unmistakable, and this may differ from arbitrator's standard of intent of the parties. (PERA)

**VII. Employer Unfair Labor Practices**
**H. Refusal to Bargain Not Found**
**4. Contract**
*b)* **Breach of Contract**

[7] Contract Interpretation Necessary to Determine Waiver Issue.
[*Same text as headnote No. 6 above*]

[*Headnotes continued on next page*]

**VII. Employer Unfair Labor Practices**
**H. Refusal to Bargain Not Found**
**12. Mandatory Bargaining Subjects and Unilateral Changes in Specific Working Conditions**
*b)* **Breach of Contract as Unilateral Change**

[8] Contract Interpretation Necessary to Determine Waiver Issue.
[*Same text as headnote No. 6 above*]

**VII. Employer Unfair Labor Practices**
**H. Refusal to Bargain Not Found**
**12. Mandatory Bargaining Subjects and Unilateral Changes in Specific Working Conditions**
*b)* **Breach of Contract as Unilateral Change**

[9] Binding Arbitration Available—General Rule.
Commission will not find ULP where charge alleges unilateral change in terms and conditions of employment, dispute involves bona fide question of contract interpretation and parties have agreed on final and binding method of resolving contract dispute. In such cases, Commission will defer to contract arbitration. However, Commission will resolve those cases where parties have not agreed on final and binding arbitration of their contract. (PERA)

**VII. Employer Unfair Labor Practices**
**H. Refusal to Bargain Not Found**
**6. Defenses**
*m)* **Waiver of Bargaining Rights**

[10] Broad Clause of Explicit Duration Beyond Contract Expiration.
Parties agreed to broad waiver clause declaring moratorium on all bargaining subjects affecting pension rights of employees for explicit duration of 10 years which extended beyond contract expiration. Commission finds it appropriate to apply its clear and unmistakable standard to interpretation of clause. Interpretation is limited to those subjects at issue in this case, not extended to any other possible contractual provisions that might affect final average compensation, and therefore also affect pension. On exceptions, Commission reverses broader holding of ALJ which would have invalidated alleged waiver as to any of 28 other contractual provisions. Because waiver clauses restrict rights normally possessed by both parties under PERA to negotiate changes in terms and conditions of employment after expiration of specific contract, such clauses are strictly construed. Commission holds that issues whether longevity payments should be included in base wage and payment of accumulated compensatory time at retirement should be made at double time or time-and-a-half rates, are not clearly and unmistakably waived by 10-year pension moratorium clause here. Commission holds only that pension moratorium clause, by itself, does not constitute waiver of right to bargain over all issues that might affect final average compensation, and question of waiver must be addressed on subject-by-subject basis. (PERA)

[*Headnotes continued on next page*]



**IX. Act 312 Proceedings**
**E. Relationship of Act 312 to PERA ULP Cases**
**4. Refusal to Bargain**
*a)* **Bad Faith Bargaining During Act 312 Proceedings**

[11] Grievance Filing During Act 312 Arbitration.
Commission rejects employer's argument that union violated obligation to bargain in good faith by filing grievance during Act 312 arbitration. Act 312 arbitration is an extension of bargaining process under PERA and conduct which seriously obstructs such process may constitute violation of PERA duty to bargain in good faith. Here union raised contract clause as defense regarding specific employer proposal during Act 312 arbitration, and filed grievance alleging employer violation of contract by employer's proposal made during Act 312 arbitration. Commission finds such conduct by union did not seriously interfere with or obstruct arbitration process. Union was seeking to advance its particular argument during arbitration, whether or not meritorious. On exceptions, Commission reverses ALJ and finds no refusal by union to bargain, not even a technical one. Charges are dismissed. (PERA)

Appearances:
For the Respondent-Union: Sachs, Nunn, Kates, Kadushin, O'Hare, Helveston & Waldman, P.C., by Ronald R. Helveston, Esq.
For the Charging Party: Mary Rinne, Esq.

## DECISION AND ORDER

On January 18, 1990, ALJ Bert H. Wicking issued his Decision and Recommended Order in the above case, finding Respondent Ann Arbor Fire Fighters Association, Local 1733, International Association of Fire Fighters (the Union) guilty of unfair labor practices under Section 10 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCL 423.210, MSA 17.455(10). The ALJ held that the Union had unlawfully refused to bargain over longevity and overtime compensation, mandatory subjects of bargaining under PERA. The ALJ found that Charging Party City of Ann Arbor (the Employer) did not waive its right to bargain over these subjects by a contract clause prohibiting alteration of "any provision or practice related to pension benefits currently in effect" for a period of 10 years. He recommended that the [Union] be ordered to cease and desist from relying on this clause as a reason for refusing to bargain over any mandatory subject of bargaining.

The Decision and Recommended Order of the ALJ was served on the interested parties in accord with Section 16 of PERA. The Union filed timely exceptions to certain findings of the ALJ on March 2, 1990. The

Employer filed timely cross-exceptions and a brief in support of other findings of the ALJ on March 30, 1990. The Union filed a timely response to the cross-exceptions on April 20, 1990.

We have reviewed the exceptions and cross-exceptions in light of the record, including the briefs filed by both parties. Although we agree with many points of the ALJ's analysis, we find that the Union did not violate its duty to bargain in good faith by its conduct in this case.

BACKGROUND AND FACTS. The Union is the collective bargaining representative for a unit of the Employer's firefighters. The dispute here has a long history.

According to the record made in an arbitration before Arbitrator Theodore J. St. Antoine, during negotiations for the parties' 1981–83 contract the Employer made a number of proposals which would have affected pension benefits by reducing the final average compensation on which pension benefits are calculated. These proposals were (1) a reduction in the compensatory time rate for overtime worked from double time to time-and-a-half[1] (2) a 96-hour cap on the accumulation of compensatory time; (3) a reduction in the accrual of sick leave for 24-hour platoon firefighters from 1 duty day to one-half day for each completed month of service; and (4) the elimination for new hires of the "roll-in" or inclusion of sick leave payments in the calculation of final average compensation for pension purposes. The Union's proposals included various improvements in existing pension benefits. In settling their contract, the parties reached agreement on a clause providing that for employees not on the payroll as of July 1, 1982, compensatory time payout, vacation payout, and sick leave payout at retirement would not be included in final average compensation. They also reached agreement on a "pension moratorium" provision, now known as Article 59. This provision is set out in full in the ALJ's opinion and is the focus of the dispute in this case. The Employer dropped its other proposals as set out above.

1. Article 29 of the parties' contract read:

> Any time worked in excess of the regularly scheduled workweek as defined by paragraph 28, shall be considered overtime. All employees except the Chief of the Department, shall be compensated for authorized overtime work in cash or compensatory time as indicated by the Employee. If the employee, elects to receive compensation for overtime work in cash, it shall be paid at a rate of time and one-half of his regular hourly rate. If the employee elects to receive compensation for overtime work in compensatory time off, it shall be granted at a rate of double time. When compensatory time is desired, the employee will determine, subject to the approval of the Chief, when it shall be taken.



Negotiations for the 1983–86 contract resulted in an interest arbitration proceeding under 1969 PA 312. The arbitration panel was headed by Paul Glendon. The Employer's last best offer in the arbitration included (1) a reduction in the rate of compensatory time from double time to time-and-a-half, with a cap of 120 hours for 40-hour employees and 168 hours for platoon employees; and (2) a reduction in the accrual rate of sick leave for both platoon personnel and 40-hour employees. The arbitration panel agreed with the Union that these proposals violated the pension moratorium provision because they changed the method of computing final average compensation for pension purposes. The arbitration panel ruled in favor of the Union's proposal to maintain the existing contract language on these issues.

Glendon's ruling was overturned by Washtenaw County Circuit Judge Patrick Conlin, who held that an Act 312 arbitrator did not have jurisdiction to interpret the moratorium provision. Conlin remanded the dispute over the meaning of the moratorium clause to a grievance arbitrator.

Theodore St. Antoine heard the grievance dispute and issued his award on January 12, 1987. After reviewing the bargaining history, he concluded that the Employer's last best offers on compensatory time and sick leave were within the intended scope of the moratorium clause. He relied upon evidence of a major adverse effect upon pension benefits that the Union had demonstrated would flow from acceptance of the City's proposals. He also relied upon the lack or any apparent abuse of sick leave or compensatory time giving rise to a justification for changing these provisions independent of their effect on pension benefits and the fact that similar proposals by the City in the 1981–83 negotiations were a significant part of the trigger for the moratorium agreement. The arbitrator agreed with the City that the mere fact that the City dropped its 1981–83 compensatory time and sick leave proposals did not mean that they were subject to the pension moratorium. He concluded, however, that the Union had deliberately bargained for and obtained extremely broad language to meet its concern that "virtually anything" related to pensions not be changed.

The parties' 1986–89 contract negotiations also ended in Act 312 arbitration. The panel in that case was chaired by Elaine Frost. The Employer's last best offer included a proposal to change the current system under which longevity pay was incorporated into the employee's base wage to a lump-sum longevity payment. The Union objected to this proposal as a violation of the pension moratorium clause because of its effect on final average compensation. In May 1988, the Union raised this issue with the 312 arbitration panel and also filed a grievance

seeking rights arbitration of the matter. The panel chairman indicated that she considered herself bound by Judge Conlin's 1986 decision that a 312 arbitration panel lacked jurisdiction to consider the effect of the pension moratorium clause. She indicated, however, that she would admit a decision by a rights arbitrator on this issue as evidence in the 312 proceeding. Shortly thereafter, on June 29, 1988, the Employer filed this charge alleging that the Union violated its duty to bargain in good faith by its "positions and actions" with regard to the moratorium clause.

The 312 panel headed by Frost issued its opinion and award on December 9, 1988. The arbitration panel rejected the Employer's longevity offer because it found that the proposal would cause major structural changes which could substantially affect compensation without sufficient justification for doing so. Contrary to Employer's claim, we find that the arbitration panel did not attempt to interpret the pension moratorium provision and did not rely on this provision in adopting the Union's position on longevity.

On December 20, 1988, the Employer amended its charge to include the allegation that the Union had unlawfully refused to bargain over the rate of payment for compensatory time when paid in cash at retirement.

As set forth above at n 1, Article 29 of the parties' contract provides that employees can elect either to be paid for overtime at time-and-a-half or to collect compensatory time at 2 hours for every 1 worked. The Employer sought to eliminate the double time aspect of the clause in the 1983–86 interest arbitration but, as discussed above, it was precluded from doing so by the St. Antoine arbitration award. In the 1986–89 interest arbitration, the Employer again sought to change this provision but only as applied to employees hired after July 1, 1988. The 312 arbitration panel headed by Frost rejected the Employer's last offer on the grounds that a two-tier system for payment of overtime should not be put into effect. Despite the fact that the arbitration panel mentioned the pension moratorium as the "first factor" in its analysis, its rejection of the Employer's offer was not based on the pension moratorium clause.

As indicated above, Article 29 provides for either cash payments of overtime at time-and-a-half or compensatory time at 2 hours for 1. According to the record, the Employer has paid retiring employees a cash settlement for accumulated comp time at double time rather than time-and-a-half. On November 23, 1988, the Employer wrote the Union indicating it was contemplating changing this practice to "enforce the contract" and offered to meet to discuss it. The parties met on December 14. At this time the Union representatives asserted that the



Employer's proposal violated the pension moratorium. The Union also filed a grievance alleging that the Employer's proposed change violated both the pension moratorium and Article 29.

THE ALJ'S FINDINGS. The ALJ held that the pension moratorium provision was an attempt to waive the parties' statutory rights to bargain over wages, hours, and terms and conditions of employment under PERA. A statutory bargaining waiver must be "clear and unmistakable." *Mid-Michigan Education Ass'n* v *St Charles Community Schools*, 150 Mich App 763 (1986); *Lansing Fire Fighters Local 421* v *Lansing*, 133 Mich App 56 (1984). The ALJ found that the pension moratorium clause here does not clearly and unmistakably waive the right to bargaining concerning wages, comp time, leave time, longevity, or "any other of the 28 contractual provisions that might affect final average compensation." The ALJ held that the Commission has exclusive jurisdiction to determine violations of PERA and is not bound by the findings of an arbitrator on statutory issues. He concluded that the Union had "technically" breached its bargaining obligation by in effect refusing to bargain concerning longevity and overtime compensation based upon reliance on the pension moratorium provision. The ALJ recommended that the Union be ordered to cease and desist from relying on the pension moratorium agreement as a defense or reason for not bargaining.

## DISCUSSION AND CONCLUSIONS

EXCLUDED EVIDENCE. The Employer excepts to the ALJ refusal to admit the following documents into the record:

1. 11/29/84 letter from Union attorney Helveston to 312 Panel Chairman Glendon, in which the Union claims that the Employer's submission of sick time and compensatory time issues to the Act 312 arbitration panel is an unfair labor practice.

2. Arbitrator Frost's pre-Act 312 summary statement dated 5/1/87, indicating that she would not rule on three Employer issues in the 312 proceeding because the Union had raised a pension moratorium clause defense to these issues. These issues did not include longevity.

3. MERC Case No. CU87 E-26, filed by the Employer on May 28, 1987, to protest the Union's assertion of the pension moratorium defense in the 312 proceeding.

4. A letter dated 6/17/87 from Employer agent Laracey to Frost regarding the Employer's position on the pension moratorium issue.

5. A letter dated 6/30/87 from Laracey to Helveston memorializing the Union's agreement to withdraw its pension moratorium

objections to the three Employer issues before the 312 panel and the Employer's agreement to withdraw its unfair labor practice charge and a circuit court action.

The Employer asserts that the ALJ erred by excluding the above evidence on the basis that it involved events taking place more than 6 months before the filing of the unfair labor practice charge. Section 16(a) of PERA precludes us from finding an unfair labor practice based on conduct occurring more than 6 months prior to the finding of the charge. However, it is well established that evidence of earlier events may be utilized to "shed light on the true nature of acts," such as the charged party's motive where motive is an issue in the case. *Lodge 1424, Machinists* v *NLRB*, 362 US 411 (1960); *NLRB* v *Lundy Mfg*, 326 F2d 921 (2nd Cir, 1963).

It appears from the record that the ALJ excluded the evidence because he believed that it was offered to establish an unfair labor practice(s) outside of the 6-month period. According to the Employer, the ALJ did not understand the purpose of this evidence. The Employer states that this evidence was offered to show "why the Union's action in raising the Article 59 issue at the last minute in the Act 312 process was an unfair tactic and to show that the Union completely understands the PERA implications of Article 59."

**[1]** We conclude that the excluded evidence should have been admitted as part of the background evidence to show the history of the parties' dispute over the pension moratorium clause. We will therefore make the disputed documents part of the record in this case.

"Validity" of the Pension Moratorium Clause. As indicated above, the ALJ recommended that the Union be ordered to cease relying on the pension moratorium clause as a reason for refusing to bargain over any mandatory subject of bargaining. The Employer, however, excepts to the ALJ's failure to find additionally that the pension moratorium clause is "invalid" under PERA. The Employer argues that a 10-year-waiver agreement is too long to be consistent with PERA's goal of promoting good faith bargaining. It also claims that a waiver clause which extends past the term of the contract in which it is included is a violation of PERA. Thirdly, it argues that the clause here waiving the right to bargain over "any provision or practice related to pension benefits currently in effect" is too broadly worded and too vague to be valid for any purpose.

Section 15 of PERA requires a public employer to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment and to execute a written contract incorporating any agreement reached if request[ed] by either



party. Under Section 15, a party is not compelled to agree to a proposal or to make a concession. PERA is concerned with the process of collective bargaining and not with the substance of the parties' agreement.

The Employer suggests that we should step in to invalidate any agreement between parties to a collective bargaining relationship which is unconscionably long. In support of this proposition it cites several cases finding employer proposals for 5-year contracts, together with other conduct, to be evidence of bad-faith bargaining under the National Labor Relations Act (NLRA), 29 USC 150. *See Wonder State Mfg Co*, 344 F2d 210 (8th Cir, 1965); *Mooney Aircraft Inc*, 132 NLRB 1194 (1966). The reasoning in these cases is that the employer clearly knew that its proposals would be unacceptable to the union. Therefore, the proposals themselves were evidence of the employer's fixed intention not to reach any agreement with the union. The issue in these cases was the employer's good faith in negotiations. These cases do not stand for the proposition that a 5-year collective bargaining agreement is *per se* invalid under the NLRA.

**[2,3]** We are not authorized by PERA to police the content of agreements to redress imbalances of bargaining power between the parties. Nor are we willing to hold that parties may not enter into a bargaining waiver of 10 years duration without violating the Act.

**[4]** As the Employer points out, we have held that the effect of a waiver contained in a collective bargaining agreement does not extend past the expiration of that agreement. *Capac Community Schools*, 1984 MERC Lab Op 1195; *Wayne County*, 1985 MERC Lab Op 168. In these cases, however, the contractual waiver had no explicit expiration date. We refused as a matter of law to presume that the parties intended their waiver to extend past the expiration of the document in which it was found. Here, however, the parties clearly and unmistakably agreed to a 10-year-pension moratorium. While the scope of this agreement may be in dispute, the length of it is not.

**[5]** Finally, the Employer argues that the pension moratorium clause should be declared invalid because it is too broad and too vague. As discussed in the ALJ's opinion, we do not give effect to a waiver of bargaining rights unless the waiver is clear and unmistakable. Again, however, our task is to determine the parties' bargaining rights and obligations under PERA, not to reform their contract.

The Employer's request that we declare the pension moratorium clause to [be] invalid is denied.

Application of the Clear and Unmistakable Standard. As the ALJ stated, waivers of statutory bargaining rights will not be given effect unless they are clear and unmistakable. That is, catchall clauses are not effective as a waiver unless there is other evidence that the

parties consciously intended the clause to foreclose further bargaining over the specific issue in dispute. The Union excepts to the application of the clear and unmistakable standard to the pension moratorium clause in this case. According to the Union, this clause is not a waiver of bargaining rights. Rather, as found by Arbitrator St. Antoine, it is a "maintenance of standards" clause. Normal principles of contract interpretation should be used to determine the parties' intent, and the Commission should be bound by St. Antoine's prior determination that the parties intended the clause to have a broad reach.

**[6,7,8]** Enforcement and interpretation of collective bargaining agreements, *per se*, are not the functions of this Commission under PERA. These duties normally fall upon the courts or arbitrators selected by the parties to interpret their agreement. However, the question of whether the parties in a case have expressly waived their rights to bargain by language in a collective bargaining agreement is a statutory question, even though it obviously requires interpretation of the agreement. We have long held that we have jurisdiction to interpret a collective bargaining agreement where necessary to determine whether an unfair labor practice has been committed. *University of Michigan*, 1971 MERC Lab Op 994. *See also, NLRB* v *C&C Plywood*, 385 US 421 (1967).

Of course, whenever we are forced to interpret a contract in order to decide if a statutory violation has been committed, there is the potential of a conflict with an arbitrator's interpretation of the contract. This is especially true whenever a waiver defense is raised, because the clear and unmistakable standard may differ from the "intent of the parties" standard used by an arbitrator. At one time, we avoided potential conflicts by deferring most contract interpretation issues to arbitrators. However, in *Detroit Fire Fighters Ass'n* v *Detroit*, 408 Mich 663 (1980), the Supreme Court concluded that deferral was not permitted by PERA.

Our jurisdiction and obligation to interpret contracts in order to resolve statutory issues was not affected by the *Detroit* decision. In *Kent Co Ed Ass'n* v *Cedar Springs*, 157 Mich App 59, 63–64 (1987), the Court found that we had the duty to resolve a statutory claim that the employer unilaterally changed existing working conditions, despite the fact that an arbitrator had already held that the employer had not violated the contract. It upheld our finding in that case that the union had not clearly and unmistakably waived its right to bargain.

However, the fact that an unfair labor practice charge has been filed does not preclude an arbitrator from resolving a contract claim arising out of the same controversy. Moreover, the courts must enforce an arbitration award unless it conflicts with a prior Commission award or



unless the contract protects what PERA prohibits. *Bay City School District* v *Bay City Education Ass'n*, 425 Mich 426, 439 (1986).

**[9]** While we have the authority to interpret a contract to determine whether an unfair labor practice has been committed, we have held, as the Union points out, that not all contract disputes give rise to statutory issues. We will not find an unfair labor practice where the charge alleges that a party has unilaterally changed the terms and conditions of employment, the dispute over whether a unilateral change has occurred involves a *bona fide* question of contract interpretation, and the parties have agreed on a final and binding method of resolving their dispute. *County of Oakland, Sheriff's Dept*, 1983 MERC Lab Op 538; *City of Kalamazoo*, 1984 MERC Lab Op 797; *Wayne-Westland Board of Education*, 1984 MERC Lab Op 86. Cf *Taylor Board of Education*, 1983 MERC Lab Op 77 (no *bona fide* interpretation dispute); *Plymouth-Canton CS*, 1984 MERC Lab Op 894 and *SEMTA*, 1987 MERC Lab Op 721 (no final and binding means of resolving the dispute).

The Union asserts that the instant charge presents a routine *bona fide* contract dispute. The unfair labor practice charge should be dismissed and the parties left to resolve their dispute through grievance arbitration. It points out that Arbitrator St. Antoine, in his 1986 award interpreting the pension moratorium clause, noted that the moratorium clause was not a traditional waiver clause wherein a union waives its right to bargain over a unilateral change. In his view, the clause was more analogous to a "maintenance of conditions" clause. The Union claims that it is not arguing that the Employer has waived its right to bargain by the moratorium clause, but rather that the Employer's proposals, if given effect, would violate the parties' contract. Thus the dispute is not a waiver of bargaining rights dispute but a true contract dispute which should be settled by arbitration.

**[10]** As Arbitrator St. Antoine noted, the pension moratorium clause is not the usual form of a bargaining waiver. Nor is it the usual maintenance of conditions clause. We agree with the Employer and the ALJ that it is appropriate to apply the clear and unmistakable waiver standard to this clause. Unlike the usual maintenance of conditions clause, the pension moratorium clause here restricts the right normally possessed by both parties under PERA to negotiate changes in terms and conditions of employment *after* the expiration of the agreement establishing those terms. While waivers of bargaining rights are not prohibited under the Act, they are strictly construed because they represent the giving up of fundamental statutory rights. However it is labeled, the pension moratorium clearly has this effect.

We also agree with the ALJ that the pension moratorium clause does not constitute a clear and unmistakable express waiver of the

right to bargain over the two issues covered by this charge: whether longevity payments should be included in the base wage, and whether payment of accumulated comp time at retirement should be made at double time or time-and-a-half rates. However, the ALJ also found that the pension moratorium clause did not waive the Employer's right to bargain over "any other of the 28 contractual provisions that might affect final average compensation." We do not extend our holding that far. We agree that the pension moratorium clause, by itself, does not constitute a waiver of the right to bargain over all issues which might affect final average compensation. However, the question of waiver should be addressed on a subject-by-subject basis. Our findings in this case are confined to the two issues before us.

THE UNION'S CONDUCT AS AN UNFAIR LABOR PRACTICE. The ALJ found that "technically" the Union breached its bargaining obligation by, "in effect" refusing to bargain. According to the Union, the ALJ erred in finding that its conduct in this case constituted a refusal to bargain.

The original charge in this case alleged that the Union violated its duty to bargain by its "position and actions" on the Employer's longevity proposal. Apparently, the Employer means both the Union's May 1988 attempt to raise a pension moratorium defense with the 312 arbitration panel and its filing of a grievance (later dropped) alleging that the Employer's proposal violated the pension moratorium clause.

The Union asserts that the ALJ erred by finding its conduct during the pendency of an Act 312 proceeding to constitute an unfair labor practice. It relies on *City of Highland Park*, 1985 MERC Lab Op 712, and *City of Detroit*, 1985 MERC Lab Op 389. It asserts that these cases hold that the Commission will not regulate the conduct of parties in Act 312 hearings by means of an unfair labor practice proceeding.

In *Highland Park*, the union sought to compel further bargaining over an issue then pending before an Act 312 panel. The ALJ concluded in that case that once a party filed for Act 312 it gave up its right to compel the other party to return to the bargaining table. We adopted the ALJ's decision after no exceptions were filed. In *City of Detroit*, the ALJ refused to find [a] violation of the bargaining obligation in an employer's refusal to present evidence on a particular issue to an Act 312 arbitration panel and its threat to walk out of the proceeding, despite the fact that the ALJ found the issue in question to be a mandatory subject of bargaining. He concluded in that case that an appeal of the Act 312 award would be an adequate remedy for the employer's conduct. We affirmed the ALJ's finding that the issue was mandatory; no exceptions were filed to his other findings. By contrast, in *City of Jackson*, 1979 MERC Lab Op 1146, we found that the Employer



committed an unfair labor practice by refusing to execute the completed award of the Act 312 arbitration panel. We also found that the Employer had deliberately obstructed the bargaining process by refusing to submit a final offer on any issue to the panel and by attacking the neutrality and competency of the neutral member of the panel after the draft award was issued.

**[11]** Arbitration under Act 312 is an extension of the bargaining process under PERA. As we indicated in *City of Jackson*, conduct which seriously obstructs the Act 312 arbitration process may in fact constitute a violation of the duty to bargain in good faith. The record here indicates that the Union (1) raised the pension moratorium defense with the Act 312 arbitration panel with regard to the Employer's longevity proposal;[2] and (2) filed a grievance alleging that the Employer had violated the contract. Unlike the Employer's conduct in *City of Jackson*, the Union's conduct here did not seriously interfere with the arbitration process. Rather, the Union simply sought to advance a particular argument, *i.e.* that the pension moratorium precluded the panel from adopting the Employer's last best offer on longevity. Whether or not its position was meritorious, the Union did not violate its duty to bargain in good faith simply by making this argument.

We note that the charge in this case does not encompass the Union's conduct prior to the commencement of the 1986–89 Act 312 arbitration. If the Union refused to discuss the longevity proposal at a time when it had an obligation to do so, *i.e.* before the commencement of the Act 312 arbitration, then it may have violated its legal duty.

The Employer also argues that the Union violated its duty to bargain by filing a grievance seeking rights arbitration concerning the effect of the pension moratorium clause on the Employer's right to propose a change in longevity. In 1986, the Washtenaw Circuit Court had ordered the parties to participate in rights arbitration concerning the effect of the clause in the 1983–86 Act 312 proceeding. We see no breach of the Union's obligation to bargain over longevity in the mere fact of the Union's filing a grievance.

The Employer's amended charge alleged that the Union unlawfully refused to bargain over its proposal to change the rate at which it paid accumulated comp time to retiring employees from double time to time-and-a-half. The Union refused to discuss this proposal on two grounds. First, it alleged that the pension moratorium applied to the proposed change. Secondly, it asserted that the proposed change violated Article

2. We find no evidence that the Union violated any prior agreement when it raised the pension moratorium defense with the Act 312 panel. According to the evidence here, the Union had previously agreed to drop the defense with regard to other issues, but not with regard to the Employer's longevity proposal.

29 of the 1986–89 contract established by the award of the Frost arbitration panel dated December 9, 1988. As indicated in the section above, we agree with the ALJ that the pension moratorium clause did not waive the Union's duty to bargain over this proposed change. However, this was not the Union's only justification for refusing to bargain; it also asserted that the proposed change was prohibited by the language of Article 29. It appears that the parties have [a] *bona fide* dispute over whether the language of Article 29 allows or prohibits the proposed change. In any case, we have not been asked to resolve this contract interpretation dispute. We conclude that the Union should not be found guilty of an unlawful refusal to bargain over the proposed change in the payout of comp time at retirement under the circumstances of this case.

CONCLUSION. We reject the Employer's demand that we declare the parties' pension moratorium clause "invalid." We agree with the ALJ that the parties' pension moratorium clause does not constitute a clear and unmistakable waiver of the Employer's right to bargain over its proposed changes in longevity and the payout of comp time at retirement. However, we believe that the question of whether the parties have clearly and unmistakably waived their right to bargain over other subjects should be addressed on a subject-by-subject basis. We do not adopt the ALJ's finding that the parties have not waived their right to bargain concerning any contractual provision affecting final average compensation. Despite our agreement with the ALJ on the application of the clear and unmistakable waiver standard to the pension moratorium clause, we disagree with him that the Union refused to bargain in this case, even technically. Therefore we do not adopt the ALJ's recommended order and instead will dismiss the charges.

Since we find that the Union committed no unfair labor practice we need not address the Employer's exception to the ALJ's failure to order the Act 312 panel to reconsider its award for the 1983–86 contract as part of his remedial order under Section 16(a).

## ORDER

The charge in the above case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION
David S. Tanzman, Chairman
Anne T. Patton, Member
Thomas Roumell, Member

Dated: July 23, 1990



## DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.210, MSA 17.455(10), this matter came on for hearing at Ann Arbor, Michigan, on January 18, 1989, before Bert H. Wicking, an ALJ for the Michigan Employment Relations Commission. Based upon the entire record in this proceeding, including the pleadings, transcript of the hearing, exhibits, and post-hearing written arguments filed by the parties on or before April 11, 1989, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

On June 29, 1988, the City of Ann Arbor filed an unfair labor practice charge with the Commission alleging:

1. The labor contract between the City of Ann Arbor and the Ann Arbor Fire Fighters Association, Local 1733, IAFF, expired on June 30, 1986. On January 30, 1987, the Association petitioned this Commission for arbitration under Act 312. On February 18, 1987, Elaine Frost was appointed as Chairperson of the Act 312 panel, Case No. 86 E-1120. Hearings were held and concluded and the parties submitted final offers on March 21, 1988. Final briefs are due to Arbitrator Frost on or about July 15, 1988.

2. One of the economic demands of the public employer is the proposal to separate longevity payments from the wage structure. (Currently longevity steps are an integral part of the wage structure.) This demand was placed on the bargaining table on February 19, 1987, bargained to impasse, certified by a mediator, and proofs were presented by both parties to Arbitrator Frost during the Act 312 hearings.

3. On May 11, 1988, almost 8 weeks *after* all the final offers were submitted, the union sent a letter to Arbitrator Frost. [Appendix 1.] In this letter, the union asserted that the City's demand to change longevity was barred by a 10 year "Pension and Manning Moratorium" clause in the contract, Article 59 (formerly Article 61) [Appendix 2].

4. The union on May 18, 1988, filed a grievance regarding the City's final offer on longevity which alleged that because a change in longevity "affects" final average compensation and because final average compensation "affects" pension, it violates the pension moratorium. [Appendix 3.]

5. The pension moratorium states that neither party shall attempt to alter any provision related to pension benefits in effect [Appendix 2]. There are about twenty-eight contractual provisions "affecting" final average compensation.

6. The union has selectively raised the pension moratorium argument when it wishes to block City proposed bargaining changes. In 1984, the union raised this argument to block the City's right to bargain on the sick time and compensatory time rate. See the 1984 union letter attached, which on page three recognizes the important statutory rights at stake [Appendix 5]. The Union has raised the issue in other contexts when it wished to prevent the City from changing the contract.

7. Arbitrator Frost has indicated that, although the Act 312 panel will proceed, a grievance arbitrator's award would be admissible as "new evidence in the now closed Act 312 record." [Appendix 4.]

8. The position and actions of the Union constitute a breach of the union's legal duty to bargain with the City over a mandatory subject of bargaining and constitute a violation of Section 10(1)(e) of the Public Employment Relations Act.

9. The City now has a vital and immediate issue at stake because its proposal to separate longevity from the wage structure is central to the entire package of last best economic offers already made to the Act 312 Arbitrator.

10. Neither a grievance arbitrator nor an Act 312 arbitrator has the authority to decide the fundamental statutory issue here: whether the position and actions of the union constitute a violation of the Public Employment Relations Act. Therefore this issue should not be deferred by MERC to a third party lacking jurisdiction to consider the City's statutory rights.

WHEREFORE, the public employer, the City of Ann Arbor, requests: 1) that the Commission order an expeditious hearing in this matter and that 2) the Commission order that the union's actions and the pension moratorium constitute a violation of PERA.

The Charge was amended on December 20, 1988, to allege:

On December 14, 1988, at a bargaining session the union president, Michael Vogel, refused to bargain about the rate of payment for overtime when paid in cash at retirement. He said the union would not bargain because the union has filed a grievance under Article 59, the Pension Moratorium. This violates the employer's rights under PERA, Section 10(3)(c). This is the identical issue raised in Count I and a further example of why and how Article 59 is being used by the union in violation of PERA.



BACKGROUND. In 1982, the Union and the City added a clause to their 1981–83 collective bargaining agreement.

Article 59: Minimum Manning/Pension Moratorium (formerly Article 61).

a. The City of Ann Arbor and the Ann Arbor Fire Fighters Association, Local 1733, IAFF, AFL–CIO, hereinafter collectively referred to as "the parties," agree that, except as provided in paragraph c. neither shall alter, attempt to alter, add to, or attempt to add to, through negotiation, arbitration, or court or administrative action, any provision or practice related to manning levels currently in effect. This prohibition shall be for a period of ten (10) years, commencing July 1, 1981. The parties further agree that this prohibition does not preclude the City from exercising its managerial prerogatives as provided b[y] Article 9, Management Rights.

b. The parties further agree that, except as provided in paragraph c, neither shall alter to attempt to alter, add to or attempt to add to, through negotiation, arbitration, or court or administrative action, any provision or practice related to pension benefits currently in effect. This prohibition shall be for a period of ten (10) years, commencing July 1, 1981. The parties further agree that this prohibition does not preclude procedural changes adopted by the City's Pension Board based on recommendations from the Board's actuary as related to actuarial assumptions which do not affect retirees' benefit levels.

c. If mutually agreed to, either party may raise, during collective bargaining, an issue related to manning or pension. If the issue or issues raised are not agreed to by the parties, the issue or issues cannot be submitted to arbitration unless the parties mutually agree to their submission.

d. In the event this agreement as it relates to either the manning or pension issue is set aside, Section 59 of this Agreement will be null and void.

Inasmuch as any bargaining regarding wages, longevity, sick time, compensatory time, overtime, or other monetary benefits would affect final average compensation/pensions, there were problems as to interpretation of Article 59.

In 1986 Arbitrator St. Antoine considered Article 59 and concluded that the City's proposal to change compensatory time and sick leave

violated the 10-year moratorium on pensions. In reaching this decision, St. Antoine reviewed the history of the bargaining with the firefighters and concluded that the language of Section 59 was so broad that it leads to ludicrous results if it covers every proposal that might have some affect or at least some adverse affect on pension benefits.

Article 59 has been reviewed by three arbitrators and a Circuit Court Judge of Washtenaw County. During Act 312 during arbitration prior to the 83–86 collective bargaining agreement, Arbitrator Glendon concluded that Article 59 precluded adoption of the City's proposals concerning sick leave and compensatory time because these proposals would affect final average compensation/pension benefits.

The Employer appealed to the Washtenaw County Circuit Court which ruled that an Act 312 interest arbitrator did not have authority to resolve what was a contractual grievance concerning Article 59. The circuit judge ruled that the matter should be decided by a grievance arbitrator.

Grievance Arbitrator St. Antoine, then, ruled that the City's last best offers on sick leave and compensatory time were barred from the Act 312 process because of Article 59. St. Antoine indicated in part, that the language of Article 59 did not indicate which subjects the parties had agreed not to bargain for during the 10-year period.

Following Arbitrator St. Antoine's 1986 hearings the parties met in January 1987 to bargain for a new contract. By March 1988, the Employer submitted its last best offer to change calculations for longevity pay. Under the prior contract, longevity pay was folded into the employee's wage scale. The City's proposal would separate longevity from the employer's overall wage, paying in a lump sum. The affect of the City's proposal would decrease the per hour pay rate which, in turn, would reduce the value of annual sick leave payout, sick leave payout at retirement, vacation time buyout at retirement, compensatory time buyout retirement, and the rate of pay for overtime hours worked. All of the buyout changes would reduce final average compensation and, arguably, violate the Article 59, 10-year pension moratorium.

On May 11, 1988, Union counsel Helveston wrote to Act 312 Arbitrator Frost that the City's last best offers on longevity pay are in violation of Article 59 (The 10-Year Pension Moratorium). Union counsel went on to indicate to Arbitrator Frost that, as in Circuit Judge Conlin's opinion, interpretation of the City's last offer, *vis-a-vis* Article 59 should be deferred to the contractual grievance procedure.

As a result of Union counsel's May 11, 1988, letter, Arbitrator Frost wrote to the parties on May 31, 1988, indicating that she was bound by Judge Conlin's decision and the questions concerning interpretation of Article 59 could not be decided by an Act 312 arbitrator. The Union's



first unfair labor practice charge was filed shortly thereafter on June 27, 1988.

On December 19, 1988, Arbitrator Frost's Act 312 arbitration award adopted the Union's last best offer of status quo on longevity, rejecting the City's attempt to separate longevity from the pay structure.

The second charge (December 20, 1988) concerned an Employer request that payment of overtime be made in accordance with Article 29 of the collective bargaining agreement, rather than as it was being done at that time. Under the contract, overtime was paid at one-and-one-half times for hours worked, or a firefighter could bank overtime hours as compensatory time at the rate of 2 compensatory hours for each hour worked overtime, at the option of the firefighter. The City wanted to discuss the discrepancy between the two-for-one payout at retirement and Article 29's provision that overtime hours taken in cash be paid at one-and-one-half times the hourly rate.

The parties met on November 29, 1988, to discuss the City's written proposals. Union President Vogel indicated that any change in the overtime compensatory time payout would violate the Article 59, 10-Year Pension Moratorium. The Union President indicated that the Union would discuss the Employer's position if the Employer put this request in writing. The Employer Representative Parker indicated that the Employer's proposal was in writing. There is now disagreement as to whether or not Union representatives then refused to bargain further concerning the Employer's offer because it would affect the Article 59 Moratorium.

On December 13, 1988, the Union filed a grievance alleging that compensatory time should be paid at the double rate and that the Employer's proposal to change payment of the double rate at retirement would affect pension benefits and would be a violation of Article 59.

The parties met on December 14, 1988. According to Employer representatives the Union representative refused to discuss the compensatory time Employer position, indicating the parties had discussed Article 59 on five–six occasions and were not going to discuss it again.

Positions of the Parties. The Employer urges that the Pension Moratorium Article 59 is unenforceable because it permits a grievance arbitrator to decide statutory bargaining rights under PERA. According to the Employer, Article 59 does not constitute a valid waiver of a party's right to bargain on a mandatory subject. The Employer reasons that a contractual agreement not to alter any provision relating to pension benefits in effect is a waiver which is so vague that it applied to everything concerning monetary benefits. As Arbitrator St. Antoine indicated, according to the Employer, Article 59 is "so broad it might lead to ludicrous results if it covers every proposal that might have some

effect on pension benefits." Section 59 is so vague, according to the Employer, that it could not possibly meet PERA standards that waiver of bargaining rights on mandatory subjects of bargaining must be clear and explicit and that waiver clauses expire with the term of the collective bargaining agreement.

The Employer also urges that the 10-year length of Article 59, if interpreted by the Union standards, would mean that every economic benefit affecting pension benefits would be a prohibited subject of bargaining. These items would include all wages, sick leave rate, compensatory time rate, compensatory time cap, longevity, compensatory time paid in cash at retirement, and any other benefit that might affect wages or final average compensation.

As to the second charge, the Employer concludes that the Union wrongfully refused to bargain concerning a mandatory subject of bargaining (compensatory time) and unlawfully relied on Article 59 as an invalid reason for refusing to bargain.

THE UNION. The Union contends that the City had refused to provide a set of last best offers, had attacked the credibility of a neutral arbitrator, sent a series of slanderous and vituperative letters to the arbitrator, had refused to sign the arbitration award, and had refused to implement or acknowledge the arbitration panel's award.

The Union also contends that filing a grievance, of which the City complains, is PERA-protected activity which cannot be the basis for a refusal to bargain charge. The City's allegation that the Union's filing of a grievance regarding the Charging Party's longevity pay proposal constitutes an unfair labor practice. It is not a basis for allegation of wrongdoing as the subject matter concerns an honest contractual dispute.

The Union, additionally contends that the filing of the Pension Moratorium grievance did not constitute a failure to confer in good faith—it was in compliance with Judge Conlin's decision to resolve contractual disputes through the contractual grievance procedure, and not through an Act 312 arbitration. All questions concerning Article 59 Pension Moratorium taken to the grievance procedure cannot be the subject of an unfair labor practice, as the judge has determined that contractual grievance arbitration is the proper method of disposing of Article 59 disputes, according to the Union. The entire problem of Arbitrator Frost's deferral to Judge Conlin's decision is moot, according to the Union, as Arbitrator Frost based her decision on issues other than Article 59 considerations.

The second charge that the Union refused to bargain concerning compensatory time is not true, according to the Union, and, in any case, the Union had no duty to bargain concerning the payment of compensatory time because any change in compensatory time could affect final average compensation and, thus, violate Article 59.



DISCUSSION AND CONCLUSION. The pivotal issue that is raised by counsel for the City is whether Article 59 is an enforceable and valid clause in the agreement between the parties. It is concluded that Article 59 cannot be used as a valid reason to refuse to bargain, or to forestall bargaining, concerning wages, overtime, compensatory time, sick time, longevity, or any other proposal concerning monetary benefits because Article 59 does not constitute a valid waiver of a right (either side) to bargain concerning mandatory subjects of bargaining.

Article 59 is a 10-year contractual term providing that the parties agree that they give up the right to bargain subjects that affect pensions. Inasmuch as any discussion of monetary benefits could/would affect average compensation for pension purposes, Article 59 waives bargaining concerning any monetary benefit. As Arbitrator St. Antoine found—the language of Article 59 is so broad it might lead to ludicrous results.

MERC has consistently held that any waiver of bargaining rights must be clear and unmistakable to be [e]ffective. In *Mid-Michigan Education Association (MEA–NEA)* v *St Charles Community Schools*, 150 Mich App 763 (1986), the Court of Appeals held that a right to bargain over a term of employment that is a mandatory subject of collective bargaining may be waived by a labor union, . . . such waiver must be clear and unmistakable. In *St Charles*, the Court held that the parties had, by past practice, allowed coordination of insurance benefits contrary to the collective bargaining agreement, and that without a specific waiver by the Union of the past practice, the Employer could not enforce contrary contractual provisions. See also Absence of Waiver to Bargain Concerning Removal of a Work [*sic*], *Lansing Fire Fighters Union, Local 421* v *City of Lansing*, 133 Mich App 56 (1984).

Article 59 is a nullity as to either party's right to bargain any monetary benefit whether or not it may affect final average compensation and a resulting change in pension benefits. There is no clear and unmistakable waiver in Article 59 to block or prohibit bargaining concerning the subjects of this charge—wages, comp time, leave time, longevity, or any other of the 28 contractual provisions that might affect final average compensation. Article 59 does not mention any of the subjects of this charge.

The various opinions of the arbitrators and the learned Circuit Judge notwithstanding, determination of allegations of unfair labor practice charges under PERA are the exclusive domain of the Michigan Employment Relations Commission. Therefore, it is recommended that the Commission, to accommodate the parties, find that, technically, the

Union has breached its bargaining obligation by, in effect, refusing to bargain concerning longevity and overtime compensation based upon reliance on Article 59 of the parties' collective bargaining agreement because Article 59 is not a valid waiver of either party's right to collectively bargain concerning mandatory subjects of bargaining.

## RECOMMENDED ORDER

It is hereby recommended that the Michigan Employment Relations Commission order that the Respondent-Union cease and desist from relying on Article 59 of the collective bargaining agreement between itself and the City of Ann Arbor as a defense/reason for not bargaining with the City of Ann Arbor concerning any mandatory subject of bargaining whether or not it may affect final average compensation concerning pension benefits.

It is further recommended that no notice be posted in this matter.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION
Bert H. Wicking,
Administrative Law Judge

Dated: January 18, 1990

In the Matter of:
CITY OF DURAND POLICE DEPARTMENT,
Respondent-Public Employer,
-and-
TEAMSTERS STATE, COUNTY AND MUNICIPAL WORKERS, LOCAL 214,
Charging Party-Labor Organization.

Case No. C99 F-103

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II. Procedure and Evidence
D. Evidence
4. Credibility Resolution

[1] Notes of Negotiator Credited Only Dates in Contract.
ALJ found that of those present at negotiations, only employer's negotiator could produce specific testimony and documents in support of position, which corroborated date of final pay raise in written contract, but contradicted contract commencement and termination dates. Others at meeting did not testify or did not produce notes to support union position. ALJ then found dates in contract were not correct. (No exceptions)



VII. Employer Unfair Labor Practices
H. Refusal to Bargain Not Found
4. Contract
c). Expiration of Contract, Effect of

[2] Ambiguity in Expiration Date Resolved in Favor of Employer.
Although contract by its terms expired June 30, 1999, it also granted specific wage increase effective from July 1, 1999 until June 30, 2000. ALJ found this at lease rendered contract ambiguous as to its expiration date, so required further inquiry to determine if mistake occurred when expiration date was transcribed. (No exceptions)

VII. Employer Unfair Labor Practices
H. Refusal to Bargain Not Found
6. Defenses
g) Mistake, Misrepresentation or Absence of Meeting of the Minds

[3] Meeting of Minds Regarding Expiration Date.
ALJ found parties had meeting of minds on all but one issue: expiration date of contract. ALJ held that evidence substantiating employer's view that specific wage increase granted from July 1, 1999 until June 30, 2000, effectively created expiration date of June 30, 2000. (No exceptions)

VII. Employer Unfair Labor Practices
H. Refusal to Bargain Not Found
6. Defenses
g) Mistake, Misrepresentation or Absence of Meeting of the Minds

[4] Mutual Mistake as to Expiration Date.
ALJ noted that Commission has allowed mutual mistake in contract or benefit to be corrected over objection of opposite party, and thus corrected expiration date in contract to occur later, to reflect end of last wage increase also found in contract. (No exceptions)

(*Headnotes continued on next page*)

VII. Employer Unfair Labor Practices
I. Remedies
8. Refusal to Bargain
a) General

[5] Expiration Date Corrected Where Meeting of Minds Shown.

ALJ noted that Commission has allowed mutual mistake in contract or benefit to be corrected over objection of opposite party, and thus corrected expiration date in contract to occur later, to reflect end of last wage increase also found in contract. Therefore, employer did not refuse to bargain at earlier expiration date in contract. (No exceptions)

Appearances:

| | |
|---|---|
| For Respondent: | Henneke, McKone, Fraim & Dawes, P.C., by Charles R. McKone |
| For Charging Party: | Pinsky, Smith, Fayette & Hulswit, by Michael L. Fayette |

DECISION AND ORDER

On March 24, 2000, ALJ James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the ALJ was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the ALJ as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Swift, Chair
Harry W. Bishop, Member
C. Barry Ott, Member

Dated: May 1, 2000

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DECISION AND RECOMMENDED ORDER

OF

ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan, on August 25, 1999, before James P. Kurtz, ALJ for the Michigan Employment Relations Commission, pursuant to a notice and complaint and notice of hearing dated June 23, 1999, issued under Section 16 of the Public Employment Relations Act

(PERA), 1965 PA 379, as amended, MCL 423.216, MSA 17.455(16). Based upon the record and post-hearing briefs filed on October 18, 1999, the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA, and Section 81 of the Administrative Procedures Act of 1969, MCL 24.281, MSA 3.560(181):

CHARGE AND BACKGROUND MATTERS. The charge in this case was filed by the above labor organization (Union) on June 8, 1999, alleging that the public employer, City of Durand, was refusing to bargain a new contract at the termination of an existing contract covering a nonsupervisory unit of full-time police officers and sergeants. On June 28 the Employer filed an answer denying the allegations, and affirmatively alleging that the existing contract continued in full force and effect through June 30, 2000, rather than June 30, 1999. The Employer contended that the Union was attempting to take advantage of a typographical error, caused by the Union, in preparing the duration clause and the title page of the signed contract.

FACTUAL FINDINGS. This charge involves the contract replacing the 1991–1994 contract, which expired on June 30, 1994. Bargaining on the new contract continued until the afternoon of July 10, 1995. The chief negotiator for the Employer was its city manager, Lynn Markland, assisted by the city clerk. The latter was apparently not present when the tentative agreement was reached. On the Union side, the bargaining was handled by the business representative for the Local, Anthony J. Marok, who was assisted by the unit steward, Paul L. Hubble. For some years the parties' collective bargaining agreements have been tied to the City's fiscal year expiring on June 30. Yearly wage increases generally, but not always, have been effective July 1. If a new contract was not reached by the expiration date of the old, increases were normally retroactive to the starting date of the new contract. In this case, the record establishes that the parties throughout the negotiations discussed only yearly wage increases beginning July 1 of the contract term, with a wage increase being offered for each year of the contract. The parties disagreed, however, over the amounts to be granted each year.

At the July 10 meeting wages were the main issue, and a number of proposals were exchanged by the parties, but no contract was reached. By the end of the meeting, the Employer was seeking a 5-year contract expiring June 30, 1999, with a wage offer of 2% the first year (1994), 2.5% the second (1995), and 3% for the remaining 3 years, fiscal 1996, 1997, and 1998. This offer had been rejected by the Union, which was seeking 4% across the board. Before adjourning the meeting the Employer decided to offer an additional 3% increase for the final year 1999, or what amounted to a 6-year agreement. The Union also rejected this offer, and the meeting ended.

Immediately thereafter, the city manager reviewed the matter and decided to make yet another offer. After the Union team returned to the bargaining table, Markland offered a signing bonus of $650 for the first year, and a 3% wage increase for the next 5 years. This offer was accepted by the Union, and the three participants signed a 1 page tentative agreement that evening. Both the notes of Markland and the tentative agreement set forth the following on wages and dates:

| 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| $650 | 3% | 3% | 3% | 3% | 3% |

This format for the tentative agreement was the same as the City's offer to the Union made just before the break in negotiations, except that the year 1999 was added with a 3% increase, and the amounts for 1994 and 1995 were changed or increased. Markland testified that the termination date in the year "2000" was verbalized by both Marok and himself during the

negotiations in connection with the Employer's last offer. Markland testified that he had no authority to agree to any wage increase outside the term of the contract. Marok, who was replaced as business representative by Les Barrett in 1997, did not testify. Hubble, who had taken another job in 1996, testified, but he had trouble remembering the details of the negotiations and he had no recollection of the 3% increase for the year 1999. He further testified that he had no memory of anything being said about the year "2000."

The Union agreed to prepare the final document for ratification by both parties. After the passage of some time, Marok asked the Employer to send him the agreement again, along with the dollar amounts of the wage increases and language for the signing bonus. Markland faxed this information to Marok on October 12, 1995. The final document, as prepared by the Union, was forwarded to the Employer in early December, containing the signatures of Marok and Hubble. This first typed contract had on the title page an effective date of "July 1, 1995," and an expiration date of "June 30, 1999." It also recited in the opening paragraph that it was being entered into "this first day of July 1995, . . ." The contract, however, contained in the wage schedule an increase for the employees for the year beginning "7/1/99," in addition to a signing bonus for the year beginning July 1, 1994. Though not raised by the parties, it is apparent that the effective date of the contract is a mutual mistake, since the record is clear that the parties intended the contract to be retroactive to the expiration date of the prior contract on June 30, 1994. The duration clause of the same document, however, contained the "1991" and "1994" dates of the prior expired contract. Both parties initially appear to have accepted this draft of the contract without further question.

At some point, however, which is not clear in the record, the obvious errors in the dates of the duration clause were "corrected" to conform with the title sheet. Thus, the duration clause was made to conform to the title page, and the opening paragraph of the contract, as one running from "July 1, 1995. . . until midnight, June 30, 1999," rather than from July 1, 1994 to June 30, 2000. The wage schedule at all times contained the increase for the fiscal year beginning July 1, 1999. Neither party noticed any mistake in the contract until Markland raised the issue in the early part of 1999. The benefits on both ends of the contract were paid by the Employer, and the contract was treated by both parties as one running from 1995 to 1999.

In the summer of 1998 the Employer and the Union were negotiating a contract covering a unit of the public works' employees. Barrett, the business representative who replaced Marok, telephoned Markland on July 16, 1998 to discuss this contract. In this same conversation, Barrett asked Markland about opening negotiations early on the police contracts. In addition to the unit of full-time police officers involved in this case, the Union also represents a unit of regular part-time officers, whose contract expired on June 30, 1999. Barrett had heard from the stewards of these units that the City was willing to begin negotiations, and this was confirmed by Markland. During this same time period, Markland talked to the new steward for the full-time police officers' unit, who had replaced Hubble, about the need to get together on contract negotiations, which contract he then believed was expiring in June 1999.

During preparation of the City budget for the 1999–2000 fiscal year, Markland noticed :while meeting with the chief of police that there was already a wage rate set for the full-time police officers for that year. After Markland reviewed his notes of the 1995 negotiations, he recalled the parties' agreement that the contract for the full-time officers would not expire until June 30, 2000. Markland then met with the Union steward, and asked him whether he knew there was a wage increase in the contract for the 1999–2000 fiscal year. The steward was unaware of the increase, but indicated he would contact the Union about the matter. In March 1999 Barrett sent a letter to the City requesting negotiations on a new contract for the full-time officers. On April 26 Barrett and

Markland had a telephone conversation in which Markland stated that there was a "problem" with the date of expiration of the contract.

The parties continued their negotiations on the contract for the part-time officers. On May 10, 1999, Markland and Barrett had a follow-up telephone conversation on the full-time unit. Markland stated that he had found his notes from the July 10, 1995 negotiations, and he faxed them to Barrett. The Union remained unconvinced about the June 30, 2000 expiration date. On June 7, 1999, Markland informed Barrett that he was going to consult the City attorney, and this charge was filed the next day. The City paid the increase to the full-time officers on July 1, 1999, as called for in the contract.

DISCUSSION AND CONCLUSIONS. The Union argues that the parties' conduct, and the signed and ratified contract itself, are consistent with a June 1999 expiration date, and that nowhere in the document is there a date of June 2000. The Union contends that it is possible to have contract provisions that extend beyond the expiration date of the contract. It cites those cases that hold that the status quo under an expired contract includes cost of living and salary grid increases, unless clearly limited by the contract. *See Firefighters, Local 1467* v *City of Portage*, 134 Mich App 466 (1984), *rev'g* 1981 MERC Lab Op 952 and 1982 MERC Lab Op 191, on remand 1984 MERC Lab Op 999 (COLA provision survives expiration of contract); *Detroit Pub. Schools (Bus Drivers and Site Mgt Units)* 1984 MERC Lab Op 579 (salary grid increases continue after contract expiration). The Union also argues that if the Employer's argument is true, then there was no meeting of the minds as to the duration of the agreement, making the contract terminable at will, so the Employer was required to bargain upon request in any event.

The Employer takes the position that the parties did have a meeting of the minds on the contract's termination date, and because of delays in preparing the final document and the parties' laxity, the written contract.did not conform to their actual agreement. The Employer notes that only Markland testified regarding the parties' actual agreement on the termination date. It also contends that the error in the termination date is demonstrated by the written tentative agreement and the notes of Markland. The City argues that this documentation and the testimony of Markland prove that there is an error in the contract's duration clause, and the contract should expire on June 30, 2000, rather than June 30, 1999.

[1]I agree with the Employer. The only firm and credible evidence of the parties' agreement regarding the contract's term was the testimony and documentation offered by the City. Marok, the spokesperson for the Union team, did not testify. His notes, if there were any, were unavailable or not offered. Hubble, the only other person present when the tentative agreement was reached, admitted he had little memory of the negotiations. He did not know that the contract contained a wage increase for the 1999–2000 fiscal year until it was brought to his attention before this hearing, and he claimed to have had nothing to do with it. He could only testify that he did not remember the year 2000 being mentioned at the bargaining table. Markland, on the other hand, was clear in his testimony that he and Marok agreed at the last minute to the 3% wage increase effective July 1, 1999, and that they both agreed that as a result the contract was to terminate on June 30, 2000. Markland's testimony, therefore, must control in this instance. I find that the dates in the written contract providing for its termination on June 30, 1999 resulted from an oversight in the drafting of the contract, and the actual date of its expiration should have read June 30, 2000.

[2]The cases cited by the Union regarding what must be maintained as the status quo after the expiration of the contract, such as COLA and wage grid increases, are not pertinent here. What must be maintained as the status quo under an expired contract is quite different from a mistake by the parties in transcribing the expiration clause when the contract was reduced to writing. Standing alone, the July 1, 1999 wage increase, which both parties acknowledge is included

in the contract, is not just another run-of-the-mill benefit granted to the Union. The granting of a wage increase outside the term of a contract is unheard-of in the experience of the undersigned, and no precedent for such an increase has been cited or found. Under the facts in this case, and given the lack of authority by the Employer's negotiator to make such a concession, the existence of the July 1 increase at least renders the contract ambiguous as to its intended expiration and requires an explanation.

**[3]**The Union's argument that a finding that the June 30, 1999-expiration date is in error means that there was no meeting of the minds on the expiration date of the contract, and the contract is, therefore, terminable at will, does not apply to this case. Mutual mistake cases often involve an issue of whether there is an agreement or contract between the parties on a given issue, but in this case the parties were considering only two dates for the expiration of the contract, both expiring on June 30 with the Employer's fiscal year: Either the June 30, 2000-date prevails, or the contract expired on June 30, 1999. The record evidence, as discussed above, substantiates the Employer's position that there was a meeting of the minds on the June 30, 2000-date. *Compare Ionia County and 64A Dist Ct*, 1999 MERC Lab Op 523 (meeting of minds found on continuation of benefit that employer omitted from final draft of contract); with *City of Grandville*, 1999 MERC Lab Op -(12-22-99) (no meeting of minds found on pension upgrade); *see also Union City Comm Schools*, 1975 MERC Lab Op 486, 488; *Lowell Board of Light and Power*, 1975 MERC Lab Op 221, 224.

**[4,5]**Where a mutual mistake in a contract or benefit has been found, the Commission has allowed it to be corrected over the objection of the other party to the contract. *See, for example, Highland Park Sch Dist*, 1978 MERC Lab Op 829, 831–832; and 1976 MERC Lab Op 622, 629–631; compare where the mistake is unilateral, rather than mutual, *Saginaw County Sheriff*, 1991 MERC Lab Op 315, 320–321. Thus, as noted above, I conclude that both parties to the contract intended it to be effective through June 30, 2000, when they agreed to the 3% increase for the added 1999 fiscal year, thereby agreeing to a 6, rather than 5, year contract. The parties are bound by the agreement, and the Employer has not refused to bargain with the Union over wages and benefits for the 1999–2000 fiscal year as alleged. All other arguments raised by Charging Party have been considered and do not change the result. Accordingly, I recommend that the Commission enter the following order:

## ORDER DISMISSING CHARGE

Based upon the findings and conclusion set forth above, the unfair labor practice charge filed in this matter is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

James P. Kurtz
Administrative Law Judge

March 24, 2000

Michigan Employment Relations Commission

**CITY** OF **TAYLOR**, Public Employer-Respondent, and POLICE OFFICERS ASSOCIATION OF MICHIGAN, Labor Organization-Charging Party

No. C08 F-110

April 29, 2010

**Related Index Numbers**

42.11 Mandatory Subjects, Case Law
42.21 Permissive Subjects, Case Law
41.31 Bargaining Procedure, Ground Rules
41.311 Bargaining Procedure, Ground Rules, Public Statements
72.52 Refusal to Bargain in Good Faith, Bargaining Demand



**APPEARANCES:**

Giarmarco, Mullins and Horton, by John C. Clark, Esq., for the Respondent

Martha M. Champine, Esq., for the Charging Party

**Judge / Administrative Officer**

DERDARIAN
GREEN
LUMBERG

**Ruling**

MERC adopted an ALJ's recommended dismissal of an unfair practice charge. Charging party unsuccessfully alleged that the municipal employer violated its good faith bargaining duty by demanding negotiations over employee pensions in a successor agreement. The ALJ rejected charging party's contention that the employer's demand violated the parties' moratorium agreement, which provided that the pension computation wasn't subject to negotiation, mediation or fact-finding until after June 1, 2017. The ALJ found no evidence that the employer insisted to impasse on any

disputed provision.

City's demand to negotiate employee pensions comports with PERA

**Meaning**

The ALJ noted that a party may fulfill its statutory duty by bargaining about a subject and entering into a contract that fixes the parties' rights and forecloses further mandatory bargaining. In addition, a party may knowingly and voluntarily relinquish its right to bargain about a matter by agreeing to clear and unambiguous contract language that unmistakably waives its rights.

Case Summary

MERC adopted an ALJ's recommended dismissal of an unfair practice charge, where exceptions were filed and then withdrawn. Charging party unsuccessfully alleged that the municipal employer violated its good faith bargaining duty by demanding negotiations over employee pensions in a successor agreement. The ALJ rejected charging party's contention that the employer's demand violated the parties' moratorium agreement, which provided that the pension computation wasn't subject to negotiation, mediation or fact-finding until after June 1, 2017. The ALJ found no evidence that the employer insisted to impasse on any disputed provision. Last, the city's decision to speak to a newspaper about the pension moratorium issue, standing alone, didn't indicate it was bargaining in bad faith, the ALJ concluded.

**Full Text**

**Decision and Order**

On July 9, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, **City** of **Taylor**, did not violate its duty to bargain in good faith under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), as alleged in the charge, and recommended that the charge be dismissed. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Respondent requested, and was granted, three extensions of time to file exceptions to the Decision and Recommended Order. On September 1, 2009, Respondent filed its exceptions with a supporting brief. (In its exceptions, Respondent did not dispute the ALJ's recommendation for dismissal. Respondent disagreed only with dicta in the ALJ's opinion indicating that the pension negotiation moratorium contained in the parties' previous contracts was lawful.) Charging Party requested, and was granted, an extension to file a response to the exceptions. On October 9, 2009, Charging Party filed its response with a supporting brief.

On March 23, 2010, the Commission received a letter from Respondent requesting leave to withdraw its exceptions to the ALJ's Decision and Recommended Order. Respondent's request is hereby approved, and Respondent's exceptions are dismissed. Inasmuch as there are no longer exceptions to the ALJ's Decision and Recommended Order said Order is adopted by the Commission.

**Order**

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

**Decision and Recommended Order of Administrative Law Judge**

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on November 1, 2008, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 10, 2009, I make the following findings of fact, conclusions of law, and recommended order.

**The Unfair Labor Practice Charge**

The Police Officers Association of Michigan filed this charge against the **City** of **Taylor** on June 5, 2008. Charging Party represents a bargaining unit of approximately seventy-nine nonsupervisory patrol officers and corporals employed by Respondent in its police department. Article 12 of the parties' most recent collective bargaining agreement, which expired on June 30, 2008, included, among other provisions, the following sentence, "Final average compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017." The charge in this case alleges that Respondent violated its duty to bargain in good faith by demanding that Charging Party negotiate changes to pensions in their successor agreement that violate the parties' pensions moratorium agreement, and by speaking to a local newspaper about this issue in violation of the parties' negotiating ground rules.

**Findings of Fact**

**History of the Pension Moratorium Provision**

Charging Party became the bargaining representative for Respondent's nonsupervisory patrol officers and corporals in 2002, replacing the employee's previous bargaining agent, the Taylor Corporals/Detectives/Patrolmen/Cadets Association, Fraternal Order of Police (FOP). The contracts between Respondent and the FOP provided employees with a defined benefit pension plan. An employee's pension upon retirement was calculated by multiplying the employee's final average compensation (FAC) by a percentage (pension multiplier) and his or her years of service. The pension multiplier and retirement eligibility provisions were set forth in the contracts. The contracts also contained provisions requiring employees to make contributions to the pension fund. The 1991-1994, 1994-1997, and 1997-2002 collective bargaining agreements between Respondent and the FOP included the following provision:

A. Pensions for sworn officers who began employment with the City prior to May 30, 1992 will be based on FAC as listed below. *Final Average compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017. The Association agrees not to seek other pension improvements in bank caps, years*

*of service, percentage multiplier, military service or any other directly related pension benefit for the same period of time. This provision shall not be applicable to demands for wages, longevity, and increases in current sick leave, vacation and/or holiday.* [Emphasis added]

1. Final Average Compensation as referred to above includes:

a. Base wage

b. Overtime Pay

c. Holiday pay

d. Vacation time earned and/or unused

e. Bonus and sick days not to exceed capped bank plus current, if any [FN1]

f. Longevity pay

g. School or degree pay

h. Compensatory time.

B. Officers whose employment with the City began on or after May 30, 1992 shall have their pension computed on base wages only. *This provision shall not be subject to negotiation, mediation, fact finding or the provisions of Act 312 of the Public Acts of 1969, as amended, for a period of twenty-five (25) years terminating on June 1, 2017.* [sic] Should this provision be deemed contrary to law and be made the subject of negotiations prior to February 1, 2017, [sic] the City and/or Union shall have the right to negotiate and/or arbitrate if necessary, Final Average Compensation and the factors utilized in computation of Final Average Compensation for all employees. [Emphasis added].

Despite the above language, in their 1997-2002 agreement Respondent and the FOP agreed to an increase in the pension multiplier in exchange for a cap on pensions at seventy percent of FAC.

The first collective bargaining agreement between Respondent and Charging Party after it became bargaining representative covered the years 2002-2005. This agreement provided for a lower employee pension contribution and added a new provision providing for spousal vesting upon the officer's completion of ten years of service. The parties also agreed to eliminate the distinction between less and more senior officers with respect to the way FAC was calculated. Article 12.4 of the parties' 2002-2005 agreement read, in its entirety, as follows:

Pensions for officers will be based on final average compensation (FAC) as listed below. *Final average compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017. The Association agrees not to seek other pension improvements in banks caps, years of service, percentage multiplier,*

*military service or any other directly related pension benefit for the same period of time. This provision shall not be applicable to demands for wages, longevity, increases in sick leave, vacations and/or holidays.* Pension benefits for officers hired prior to May 30, 1992 shall not be reopened or changed unless agreed upon by the majority of the sworn officers entitled to the pre-May 30, 1992 pension benefit and the **City** of **Taylor**. [Emphasis added.]

(1) Final Average Compensation as referred to above includes:

(a) Base wage

(b) Overtime pay

(c) Holiday pay

(d) Vacation time earned and/or unused

(e) Bonus and sick days not to exceed capped bank plus current, if any

(f) Longevity pay

(g) School or degree pay

(h) Compensatory time

Article 12.4 was carried over without change into the parties' 2005-2008 contract.

In early 2008, during the term of the 2005-2008 agreement, the parties entered into a memorandum of understanding (MOU) providing that overtime attributable to a certain special detail would not be included in an employee's FAC.

**The Parties Begin Bargaining a New Contract**

As noted above, the parties' 2005-2008 agreement expired on June 30, 2008. On or about April 15, 2008, the parties met to begin negotiating a successor. Gary Pushee, Charging Party's business agent, was Charging Party's chief spokesperson and John Clark, Respondent's counsel, was chief spokesperson for Respondent. At the first bargaining session, the parties agreed to a set of written ground rules for their negotiations. One of the ground rules read as follows:

Either party may, with 48 hours prior notice to the other party, issue a media press release regarding issues involving negotiations. Said notice must include the specific subject matter of the media press release.

At this same bargaining session, both parties presented sets of written contract proposals. Respondent's proposals

included major changes to pension benefits. First, Respondent proposed to eliminate the defined benefit pension plan for new employees -- employees hired on or after July 1, 2008. Second, for employees hired before that date, Respondent proposed to cap FAC at twenty percent above the employee's annual final base wage (excluding longevity, holiday pay and any other additional monies paid to him) at the time of retirement. Third, Respondent proposed to increase employees' pension contributions. Finally, Respondent proposed to exclude overtime and payoffs for accrued vacation and sick leave from FAC. Charging Party objected to the pension proposals as violating the pension moratorium language. It did not indicate whether its objection extended to all four parts of Respondent's proposal. Respondent said that its position was that the pension moratorium was unenforceable. Respondent suggested that the parties enter into a MOU stating that they would discuss Respondent's proposals without either party waiving its legal position as to the enforceability of the moratorium. Charging Party said that it would consider this. A day or so after the meeting, Pushee called Clark and told him that Charging Party would not agree to the MOU. Between April 15 and the date of the unfair labor practice hearing on November 1, 2008, neither party requested to meet again to bargain.

Sometime between April 15 and May 11, 2008, Clark spoke to a reporter from a local newspaper about Respondent's plan to file an action for declaratory judgment in Wayne County Circuit Court seeking to have the moratorium provision declared invalid and unenforceable as against public policy. Clark's comments were printed in the newspaper on May 11. On May 12, 2008, Respondent filed the lawsuit. In the complaint, Respondent maintained that its pension and retiree health insurance costs were skyrocketing. It also asserted that as a result of rising labor costs and falling revenues, Respondent's unreserved fund balance had plummeted and its reserves for contingencies had been extinguished. On June 5, 2008, Charging Party filed the instant charge.

**Discussion and Conclusions of Law**

The duty to bargain under Section 15 of PERA extends to those subjects found within the scope of the phrase "wages, hours and terms and conditions of employment." Subjects included within that phrase are referred to as mandatory subjects of bargaining. Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject if it has been proposed by either party, and neither party may take unilateral action on the subject absent an impasse in the negotiations. The remaining matters not classified as mandatory subjects of bargaining are referred to as either "permissive" or "'illegal" subjects of bargaining. The parties may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to the point of impasse. Detroit Police Officers Ass'n v. City of Detroit, 391 Mich 44, 54-55 (1974). The parties are not prohibited from discussing an illegal subject of bargaining, although a contract provision embodying an illegal subject is unenforceable. *Detroit Police Officers Ass'n;* Michigan State AFL-CIO v. MERC, 453 Mich 362, 380 (1996).

A party can fulfill its statutory duty by bargaining about a subject and entering into a contract that fixes the parties' rights and forecloses further mandatory bargaining. Port Huron Educ Ass'n, MEA/NEA v. Port Huron Area School Dist., 452 Mich 309, 318 (1996). In addition, a party may knowingly and voluntarily relinquish its right to bargain about a matter by agreeing to clear and unambiguous contract language that unmistakably waives its rights. Port Huron, at 320; Amalgamated Transit Union v. Southeastern Michigan Transportation Authority, 437 Mich. 441, 461(1991).

Pensions, and all significant provisions of pension plans, are mandatory subjects of collective bargaining under

PERA. Detroit Police Officers Assn v. City of Detroit, 212 Mich App 383, 391 (1995); Detroit Police Officers Ass'n, 391 Mich 44 at 63. The charge in this case alleged that Respondent demanded to bargain over changes in the pension provisions of the collective bargaining agreement in violation of the pension moratorium contained in Article 12.4. In its brief, however, Charging Party asserts only that Respondent unlawfully sought these changes. The record reflects that in April 2008, Respondent presented proposals which Charging Party claimed were within the scope of the pension moratorium. Respondent argued that the pension moratorium clause was invalid. Charging Party disagreed. Respondent then suggested that the parties agree to leave the proposals on the table, with Charging Party reserving the right to argue later that it had no obligation to bargain over them. Charging Party rejected this suggestion. After this exchange, neither party requested further bargaining. Apparently, both parties agreed to wait until the pension moratorium issue was resolved. I conclude that Respondent did not violate its duty to bargain simply by bringing its proposals to the bargaining table, even if Charging Party had no obligation to bargain over them. I find no evidence that Respondent insisted to impasse on any of the disputed provisions or that it refused to continue bargaining unless Charging Party agreed to discuss them. For this reason, I recommend that the Commission dismiss the allegation that Respondent committed an unfair labor practice by demanding that Charging Party negotiate changes which allegedly violated the parties' pension moratorium agreement.

However, it is apparent that the parties have an ongoing dispute over the validity and scope of the pension moratorium provision which both parties wish to have resolved. For this reason, I will analyze the arguments raised by Respondent in its brief, even though the discussion that follows is dicta.

Respondent makes three arguments in its defense. First, it asserts that the pension moratorium is contrary to the purposes of PERA, including its goal of promoting good faith bargaining and the prompt resolution of labor disputes. Respondent points out that, like other municipalities in Michigan, it is now facing an unprecedented economic crisis of undeterminable duration, with falling revenues and escalating pension and insurance costs. It maintains that gaining control over these costs is absolutely vital to both its short and long term fiscal stability. Respondent asserts that for collective bargaining to be viable, it is essential that the parties be free to negotiate on a regular basis, especially with respect to economic subjects. The lengthy pension moratorium that Article 12.4 arguably provides, it asserts, conflicts with the fundamental purposes of the Act. Accordingly, Respondent asks the Commission to declare the pension moratorium provision unenforceable as contrary to PERA.

Respondent's second argument is that the pension moratorium provision is too ambiguous, confusing and contradictory be given any effect. It points out that although Article 12.4 begins with an absolute prohibition on negotiations over FAC, its second sentence refers to "any other directly related pension benefit." Respondent maintains that since this phrase is undefined in Article 12.4, it could be interpreted to broaden the moratorium beyond FAC. However, according to Respondent, the next sentence, beginning "This provision shall not be applicable ..." carves out exceptions so significant as to render the first sentence, and the entire clause, meaningless. Respondent also argues that under any reading, the pension moratorium clause does not encompass Respondent's proposal to eliminate the defined benefit plan for new hires or its proposal to increase employee pension contributions. [FN2]

Respondent's third argument is that the parties, by negotiating numerous changes in pensions since 1992, have demonstrated their intent to render the pension moratorium provision null and void. Respondent cites Port Huron Ed Ass'n, at 312, in which the Supreme Court held that unambiguous contract language controls unless there is a past

practice so widely acknowledged and mutually accepted that it amends the contract, and Detroit Police Officers Ass'n v. Detroit, 452 Mich 339 (1996). In the latter, the Supreme Court held that by effectively ignoring an express provision in the city charter/collective bargaining agreement over a period of decades, the parties had demonstrated their agreement to modify that provision.

In *Ann Arbor Fire Fighters Local 1733,* 1990 MERC Lab Op 528, an employer argued, as Respondent does here, that a so-called pension moratorium agreement was contrary to the purposes of the Act. The employer filed an unfair labor practice charge after the union argued to an Act 312 arbitration panel that the pension moratorium provision in the parties' expired contract barred the panel from ruling on the employer's proposals to make certain changes in benefits not specifically related to pensions. Specifically, the employer proposed to replace longevity increases incorporated into the employee's base wage with lump sum longevity payments and to change the rate of payment for compensatory hours paid out in a lump sum upon retirement for recently hired employees from double time to time-and-a-half. The union argued that the employer had waived its right to bargain over these changes because the changes would affect FAC and, therefore, the amount of the employees' pensions. The clause upon which the union relied read, in pertinent part, as follows:

b. The parties further agree that, except as provided in paragraph c, neither shall alter or attempt to alter, add to or attempt to add to, through negotiation, arbitration or court or administrative action, any provision or practice related to pension benefits currently in effect. This prohibition shall be for a period of ten (10) years, commencing July 1, 1981. The parties further agree that this prohibition does not preclude procedural changes adopted by the City's Pension Board based on recommendations from the Board's actuary as related to actuarial assumptions which to not affect retirees' benefit levels.

c. If mutually agreed to, either party may raise, during collective bargaining, an issue related to manning or pension. If the issue or issues raised are not agreed to by the parties, the issue or issues cannot be submitted to arbitration unless the parties mutually agree to their submission.

Over a year before the charge was filed, a grievance arbitrator ruled that the above language constituted a broad ban on changes in "virtually anything" related to pensions.

The Commission first noted that while bargaining waivers contained in a contract are presumed to expire with the expiration of the contract, in *Ann Arbor Fire Fighters* the parties had clearly expressed their intent that the waiver extend beyond the contract term. It also rejected the employer's argument that it should declare the clause invalid or unenforceable because the agreement was unconscionably long. It stated that it was not authorized by PERA to police the contents of agreements to redress imbalances in bargaining power between parties, and held that it was not willing to hold that parties could not enter into a valid bargaining waiver of ten years duration.

In this case, there is no dispute that the parties freely and knowingly entered into the contract language which is the subject of this dispute. As the Commission noted in *Ann Arbor Fire Fighters,* it is not the Commission's role to reform an agreement reached by parties to a collective bargaining relationship or to alter the bargain they intentionally reached, even if this agreement has bad consequences for one of the parties or for the bargaining unit as a whole. [FN3]One of the fundamental purposes of PERA is the encouragement of the voluntary settlement of disputes and the

incorporation of these settlements into written agreements. In *Ann Arbor,* the Commission refused, I believe correctly, to hold that parties cannot enter into a valid agreement waiving their rights to bargain over a specific topic or topics after the expiration of the document in which the waiver is contained. Like the pension moratorium in *Ann Arbor,* the moratorium in this case has an ending date, even though it is a decade into the future. I am as reluctant as the Commission was in *Ann Arbor* to hold that a bargaining waiver with an ending date is an "unconscionable" agreement. [FN4]I conclude that the pension moratorium contained in Article 12.4 was not an illegal agreement, and that it would be inappropriate for the Commission to declare this agreement invalid.

I agree with the Commission in *Ann Arbor,* however, that a pension moratorium, as a written waiver of the right to bargain, must clearly and unmistakably waive a party's right to bargain over the subjects in dispute. In *Ann Arbor,* the Commission concluded that the broad language of the moratorium clause in that case did not constitute a clear and unmistakable waiver of the employer's right to bargain over whether longevity payments should be included in the base wage, or whether employees should be paid double time for their accumulated compensatory time at retirement, because neither of these topics were explicitly mentioned in the provision. In this case, Respondent argues that Article 12.4 does not clearly and unmistakably waive anything because it contains so many contradictions that it is without meaning. I disagree. Read as a document drafted by parties familiar with both the collective bargaining process and pension terms of art, I find the language unambiguous. The second sentence, "Final Average Compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017," clearly and unambiguously expresses the parties' intent that neither party be compelled to bargain over proposals to change how FAC is computed for the duration of the moratorium. Both parties clearly knew that this sentence would not become an issue unless the parties disagreed, and they clearly did not intend to prohibit themselves from mutually agreeing to changes in FAC for the period of the moratorium. The third sentence clearly waives Charging Party's right to demand bargaining over increases in the amount of sick, vacation and bonus leave employees can be paid for at retirement, i.e. banks caps, as well as other components of the pension unrelated to FAC, such as service credits and the pension multiplier. Again, this sentence gave Respondent the right to refuse to bargain over proposals of this nature, but did not prohibit Charging Party from making such proposals or the parties from mutually agreeing to them. Finally, the fourth sentence makes it clear that the parties' duty to bargain over wages, longevity pay, sick, vacation and holiday pay is not affected by the provision.

Applying the unambiguous language of Article 12.4 to the actual proposals presented by Respondent in April 2008, I find that Charging Party had a right to refuse to bargain over the exclusion of overtime pay and accrued vacation and sick leave from FAC, and the imposition of a ceiling on FAC, because these issues affect how FAC is computed. I find that Article 12.4 does not waive Respondent's right to bargain over an increase in the employee contribution to the pension fund, a subject not mentioned in the clause and unrelated to FAC. I also find that Respondent did not waive its right to bargain over a change from a defined benefit to a defined contribution pension plan for new employees. FAC is a term with meaning only in the context of a defined benefit pension plan. However, Article 12.4 does not clearly and unambiguously require Respondent to provide a defined benefit plan for new employees hired after the term of the expired contract and not previously covered by any pension plan.

I also find that the parties did not agree to modify Article 12.4 by agreeing to certain changes in the pension provisions over the term of the moratorium. As indicated above, when parties enter into language waiving a party's rights to bargain, they expect the waiver to take effect only when the other party asserts it. Insofar as the record discloses, Respondent and Charging Party mutually agreed to bargain over the changes in FAC that were incorporated into their

2002-2005 contract. The fact that these changes were proposed and agreed to by one of the parties does not demonstrate that the parties agreed that the pension moratorium could not be asserted by either party for the remainder of its life.

Charging Party also alleges that Respondent violated its duty to bargain by speaking to a newspaper about the pension moratorium issue without giving Charging Party advance notice, thereby allegedly violating the parties' negotiating ground rules. I addressed a similar argument in *Grand Rapids Public Museum,* 2002 MERC Lab Op 222, a decision and recommended order written by me and adopted by the Commission when no exceptions were filed. *See also* Sault Ste Marie Ed Ass'n, 20 MPER 89 (2007), (no exceptions). After reviewing decisions on this issue by labor relations agencies in other states and the National Labor Relations Board, I concluded that a violation of a negotiating ground rule should be considered an unfair labor practice only in the context of the parties' other conduct. I continue to adhere to that view, and I find that Respondent's decision to speak to the newspaper in this case, standing alone, does not support a finding that it was bargaining in bad faith.

In accord with the findings of fact and discussion and conclusions of law above, I conclude that Respondent did not violate its duty to bargain by its conduct in this case. I recommend, therefore, that the Commission issue the following order.

**Recommended Order**

The charge in this case is dismissed in its entirety.

FN1. Sick leave and vacation leave are placed in banks as they are accrued. There is a cap on the number of sick and vacation hours that can be banked. After an employee reaches the cap, the employee is paid for leave as it accrues. When an employee retires, he is paid a lump sum for his banked sick and vacation leave hours.

FN2. It is not clear whether Charging Party is arguing that the pension moratorium covers all of the pension proposals made by Respondent on April 15, 2008. The charge alleges only that Respondent demanded to bargain changes to the pension provisions "involving the components of final average compensation," and Charging Party's brief does not even mention Respondent's proposal to increase the pension contribution.

FN3. Although neither party makes this point, the inevitable effect of the pension moratorium in the current economic climate is reduced wages, benefits and job security for active members of the unit.

FN4. In support of its argument, Respondent cites two cases arising under the National Labor Relations Act. Neither of the cases is apposite. In National Labor Relations Board v. Reed & Prince Mfg Co.,118 F2d 874 (1941), the Court held that it was an unfair labor practice for an employer to insist on a contract clause in which the union and employees agreed that during the term of the agreement or "at any time in the future" they would not request or demand either a closed shop or dues checkoff. In National Labor Relations Board v. National Licorice Co., 309 US 350 (1940), the Supreme Court affirmed the National Labor Relations Board's finding that the employer committed multiple unfair labor practices, including coercing its employees into signing individual contracts promising not to demand a closed shop or a signed agreement with the union, and affirmed the Board's order requiring the employer to take no action to

enforce the agreements.

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Michigan Employment Relations Commission

COUNTY OF **WASHTENAW** and **WASHTENAW** COUNTY SHERIFF'S DEPARTMENT Public Employers, and MICHIGAN ASSOCIATION OF POLICE, Petitioner-Labor Organization, and POLICE OFFICERS ASSOCIATION OF MICHIGAN, Incumbent-Labor Organization.

No. R05 D-074

February 1, 2006

**Related Index Numbers**

32.141 Filing of Petition, Bars to Petition, Contract
32.81 Orders/Rulings/Decisions of Board, Dismissal of Petition



**APPEARANCES:**

Gallagher & Gallagher, PLC, by Paul Gallagher, Esq., for the Public Employers

Pierce, Duke, Farrell & Tafelski, PLC, by M. Catherine Farrell, Esq., for the Petitioner

Martha M. Champine, Esq., Assistant General Counsel, for the Incumbent

**Judge / Administrative Officer**

LYNCH
GREEN
LUMBERG

**Ruling**

MERC dismissed a union's representation petition, through which it sought to sever police officers, detectives and emergency dispatchers from a broad union of nonsupervisory employees currently represented by the incumbent union. The contract bar began to run on December 4, 2002, when the county employers ratified the agreement, MERC found. Accordingly, the petition was barred because it was filed by the union more than 150 days prior to expiration of the third year of a five-year agreement, it concluded.

Contract bar results in dismissal of union's representation petition

**Meaning**

MERC observed that the "window period," during which a valid petition for election may be filed for public employees covered by PERA (except for school employees), is from 150 to 90 days prior to the bargaining agreement's expiration.

**Case Summary**

MERC dismissed a union's representation petition, through which it sought to sever police officers, detectives and emergency dispatchers from a broad union of nonsupervisory employees currently represented by the incumbent union. It observed that the "window period," during which a valid petition for election may be filed for public employees covered by PERA (except for school employees), is from 150 to 90 days prior to the bargaining agreement's expiration. Here, the contract bar began to run on December 4, 2002, when the county employers ratified the agreement, MERC found. Accordingly, the petition was barred because it was filed by the union more than 150 days prior to expiration of the third year of a five-year agreement, it concluded.

**Full Text**

**Decision and Order Dismissing Petition for Representation Election**

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and 412.213, this matter was assigned to David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. On or before August 8, 2005, the parties agreed to a stipulation of facts in lieu of a formal hearing. Based upon the entire record, including the stipulation, exhibits, and briefs, the Commission finds as follows:

**The Petition:**

In the petition for representation election filed on April 21, 2005, and amended on May 11, 2005, the Michigan Association of Police (MAP) seeks to sever police officers, detectives, and emergency dispatchers from a broad unit of nonsupervisory employees currently represented for purposes of collective bargaining by the Police Officers Association of Michigan (POAM). Petitioner contends that severance is appropriate because the existing bargaining unit consists, in part, of employees who are ineligible for compulsory arbitration under 1969 PA 312, as amended MCL 423.231 et seq. The County of **Washtenaw** and the **Washtenaw** County Sheriff (the Employers) and the POAM oppose the petition, arguing that it is barred by Section 14 of PERA.

**Facts:**

The stipulation of facts submitted by the parties in this matter provides, in pertinent part:

4. The County of **Washtenaw** Board of Commissioners and **Washtenaw** County Sheriff and POAM are operating under a collective bargaining agreement in effect beginning January 1, 2002 through December 21, 2006, a five year contract.

5. This agreement was ratified by the local union November 25, 2002, subject to final approval by the POAM.

6. This [a]greement was approved by the County of **Washtenaw** Board of Commissioners in a resolution dated December 4, 2002, and ... was voted on in a public meeting held on that date.

7. Retroactive pay checks were issued to all bargaining unit employees on December 20, 2002.

8. A final collective bargaining agreement was signed by the duly authorized Union representative on May 23, 2003.

9. After the duly authorized union representative signed the agreement on May 23, 2003, and before it was signed by County of **Washtenaw** Board of Commissioners Chairperson, Leah Gunn at an open meeting of the Board of Commissioners on June 4, 2003, it was also signed by Sheriff David J. Minzey.

10. This collective bargaining agreement was signed and sealed by the County Clerk, Peggy M. Haines, on June 9, 2003.

11. There are no other unit composition issues including but not limited to the Petitioner's ability to petition for a severance of the law enforcement unit from the original unit.

**Conclusions of Law:**

The sole issue to be decided in this matter is whether MAP's April 21, 2005 petition for election was timely filed under Section 14 of PERA, which provides that a valid collective bargaining agreement may bar an election for a period of up to three years. Section 14 of PERA states, in pertinent part:

An election shall not be directed in any bargaining unit or sub-division thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration. A collective bargaining agreement shall not bar an election upon the petition of persons not parties thereto where more than three years have elapsed since the agreement's execution or last timely renewal, whichever was later.

The window period during which a valid petition for election may be filed for public employees covered by PERA, other than school employees, is from 150 to 90 days prior to the expiration of the collective bargaining agreement. Rule 141(3)(b) of the Commission's General Rules, 2002 AACS, R 423.141(3)(b). This window period is intended to stabilize collective bargaining by allowing the last 90 days of an agreement to be free from questions concerning representation. *Garden City Bd. of Ed.,* 1989 MERC Lab. Op. 1045.

The Employers and the POAM contend that MAP's petition for election should be dismissed because it was filed on April 21, 2005, more than 150 days prior to the expiration of the third year of the five-year contract, beginning with May 23, 2003, the date the agreement was signed by the Union. According to MAP, the contract bar period in this case should begin on January 1, 2002, the effective date of the POAM's current agreement with the Employers. Therefore, MAP contends that the petition is timely because it was filed more than three years after the expiration of the third year of the contract.

We disagree with MAP's assertion that reliance on the effective date of the collective bargaining agreement is the only way to prevent the parties from arbitrarily extending the contract bar period in contravention of Section 14 of PERA. *Citing City of Warren,* 1986 MERC Lab. Op. 101, MAP urges us to follow the rule of the National Labor Relations Board holding that the three-year contract bar runs from the effective date of contract. In *City of Wyandotte,Police Dep't.,* 1999 MERC Lab. Op. 289, 294-296 we distinguished *City of Warren* and explained that the NLRB's contract bar rule is not the result of a statutory provision, "it is 'self-imposed and discretionary in application,'" and not analogous to the contract bar rule under PERA.

Although Section 14 of PERA states that the contract bar period begins to run from the date of "execution," that term is not specifically defined within the Act. When terms are not expressly defined by statute, it is appropriate to consult dictionary definitions. Words should be given their common, generally accepted meaning, if consistent with the legislative aim in enacting the statute. Tull v. WTF, Inc., 268 Mich. App. 24 (2005); Rose Hill Center, Inc. v. Holly Twp., 224 Mich. App. 28, 33 (1997). In this context, "execution" is generally understood to mean the "[validation of a written instrument, such as a contract or will, by fulfilling the necessary legal requirements." Black's Law Dictionary (8th ed. 2004). A collective bargaining agreement is considered complete and binding upon the parties once it is reduced to writing and signed or, if required, upon ratification by the parties. *See e.g. City of Pontiac,* 1992 MERC Lab. Op. 245; *Shelby Twp.,* 1989 MERC Lab. Op. 704, 708-709. See also MCL 423.215, which permits the "execution" of a negotiated collective bargaining agreement by incorporation in a "written contract, ordinance or resolution."

In the instant case, the POAM and the Employers reached a tentative agreement on a five-year collective bargaining agreement covering the period January 1, 2002 to December 31, 2006. Although that agreement remained unsigned until May 23, 2003, it was ratified by the members of the bargaining unit on November 25, 2002, and by the Employers on December 4, 2002. We conclude that the contract bar period began to run on December 4, 2002, when the agreement became final and binding on the parties, and that the subsequent signing of the written document incorporating the terms of that agreement was a mere formality or ministerial act. *See e.g. City of Brighton,* 1990 MERC Lab. Op. 329, 331-332; Shelby Twp., supra; City of Lincoln Park, 1982 MERC Lab. Op. 479, 492-493 (no exceptions); *Dickinson Co. Memorial Hosp.,* 1978 MERC Lab. Op. 1250, 1254. Accordingly, the April 21, 2005, petition for election must be dismissed because it was filed by MAP more than 150 days prior to the expiration of the third year of the five-year agreement.

**Order**

Based upon the above findings of fact and conclusions of law, the petition for a representation election filed by MAP is hereby dismissed.

END OF DOCUMENT

**WAEL DOKHO and MARY ANN DOKHO, Plaintiffs-Appellants, v MICHAEL JABLONOWSKI, Defendant, and AAA OF MICHIGAN, Garnishee-Defendant-Appellee.**

**No. 306082**

COURT OF APPEALS OF MICHIGAN

2012 Mich. App. LEXIS 2253

November 15, 2012, Decided

**NOTICE:** THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**PRIOR HISTORY:** [*1]
Oakland Circuit Court. LC No. 05-067862-NO.



**JUDGES:** Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.



**OPINION**

PER CURIAM.

Plaintiffs appeal by right from the opinion and order of the trial court denying their motion for summary disposition and granting summary disposition to garnishee-defendant AAA of Michigan (AAA) pursuant to MCR 2.116(C)(10). We affirm.

I. BASIC FACTS

This appeal arises out of a garnishment proceeding brought by plaintiffs. Plaintiffs originally brought suit in 2005 against defendant Michael Jablonowski seeking damages for injuries Wael Dohko allegedly sustained on April 8, 2003, as a result of a fall on the Elgin Street property where Michael resided.

Markus and Henia Jablonowski had purchased the Elgin Street property in 1966. Following the death of Markus, Henia became the sole owner of the property until her death on June 20, 2002. Michael (Henia's son) lived with Henia before her death, and continued to live in the home after her death until the home was conveyed to an unrelated seller in 2005. Michael never had an ownership interest in the property.

Prior to her death, Henia had purchased a homeowner's insurance policy from AAA; the parties agree that a homeowner's policy in [*2] her name was in place from February 4, 2002 to February 4, 2003. The parties agree that Michael was covered under this policy as a "resident relative." Although this policy was not produced at trial, it appears the parties agree that only Henia was listed as the named insured.

In late 2002, after Henia's death, AAA mailed a "Renewal Homeowner's Declaration Certificate" to Henia at the Elgin street address. Henia was the only named insured listed on the certificate. The renewal policy term was to be from February 4, 2003 to February 4, 2004. Plaintiffs allege that Michael paid for the renewal of this policy; AAA agreed with the allegation for the purposes of summary disposition and the instant appeal.

The policy thus was renewed for the February 4, 2003 to February 4, 2004 term, with Henia listed as the sole named insured. On April 8, 2003, Wael slipped and fell on a snow or ice-covered handicap ramp while delivering mail to the Elgin Street address. Michael moved out of the house on Elgin Street on June 11, 2005.

Plaintiffs filed suit in 2005, but were not able to serve Michael by personal service; they obtained the trial court's permission for substituted service by mail and posting [*3] of the summons at the Elgin Street property. Michael did not plead or appear in the action, and plaintiffs obtained a default and default judgment in the amount of $250,000 against him.

According to Michael, he first learned of the lawsuit when plaintiffs unsuccessfully attempted to obtain satisfaction on their judgment from his mother's estate. Shortly thereafter, he notified AAA by telephone of Wael's fall on the property. Computer records of AAA introduced below indicate that AAA was aware of the lawsuit and Henia's death by July 24, 2006. The computer records also indicated that the claims adjuster for AAA, Deborah Hoehnscheid, was "not sure about coverage here, whether there was ever proper service, whether there is an issue regarding the insurance status due to the fact the named insured was deceased at the time of this loss and insurance still in her name, not the son's name" on July 26, 2006. After receiving copies of the lawsuit and Wael's medical records, AAA denied coverage for plaintiffs' claim on October 26, 2006.

Plaintiffs then filed a writ of garnishment against the 2003-2004 policy issued by AAA. AAA responded in its disclosure that "Garnishee never insured defendant, [*4] Michael Jablonowski." Plaintiffs served interrogatories and requests for admissions on AAA, requesting documents related to the policy, claims history, and when and how AAA was notified of plaintiffs' suit, although they did not specifically request an "underwriting file." AAA answered the interrogatories and provided the requested documents.

During this time period, Michael attempted to have the default judgment set aside, but was unsuccessful. No further action occurred until November of 2008, when plaintiffs filed a second writ of garnishment against the policy; AAA responded the same as it did the first writ. Plaintiffs then sent additional interrogatories inquiring into premium payments after Henia's death and any claims paid on behalf of Michael, although there again was no specific request for an underwriting file. AAA answered these interrogatories as well, and indicated that it could not determine who paid any premiums after Henia's death, or when they were paid, stating "Records not available. Premium payment information purged."

In October of 2009, plaintiffs mailed supplemental interrogatories and a deposition notice to AAA that made the first specific mention of the term [*5] "underwriting file." The request for the underwriting file was repeated in two deposition notices in 2010. AAA's Deborah Hoehnscheid testified that she requested that the underwriting department produce any relevant documents prior to her deposition, but that she was informed on March 16, 2010 that all information on the 2003-2004 policy had been purged pursuant to AAA's corporate retention policy.

Plaintiffs moved for entry of judgment and summary disposition against AAA in late 2010, arguing that the policy provided for coverage and that they were entitled to an adverse inference due to AAA's destruction of its files; AAA responded with its own motion for summary disposition, stating that the policy was invalid because of Henia's death, and that it had purged its files as a result of good-faith routine procedures. The trial court heard oral arguments on the parties' motions, and issued an opinion and order in June 2011 denying plaintiffs' motion and granting summary disposition to AAA. The trial court concluded that the 2003-2004 homeowner's policy excluded coverage of plaintiffs' claim, because the declaration certificate only named Henia as the named insured and Michael could not [*6] be an insured "resident relative" as "one could not possibly reside with a deceased homeowner." The trial court also found that the policy was not transferred to Michael.

The trial court also addressed plaintiffs' argument that they were entitled to an adverse inference due to AAA's destruction of its files:

> With regard to the destruction of the underwriting files and whether AAA was ever on notice of Ms. Jablonowski's death--first, the testimony of Ms. Hoenscheid was that AAA does not necessarily maintain an underwriting file on each of its accounts; second, it would be difficult, if not impossible to prove a negative-that it was not notified of Ms. Jablonowski's death. Here, the evidence shows that AAA was not on notice of the death as it renewed the policy in Ms. Jablonowski's name--query, why would AAA renew a policy in the name of a deceased homeowner?

Plaintiffs moved for reconsideration, which the trial court denied.

II. SPOLIATION OF EVIDENCE

On appeal, plaintiffs first argue that they were entitled to an adverse inference; specifically that AAA intentionally issued the 2003-2004 policy with notice of Henia's death. Although we agree that AAA should not have purged its files, we disagree [*7] that the trial court's ruling requires reversal.

A trial court's decision on sanctions for failure to preserve evidence "will be reversed 'only upon a finding that there has been a clear abuse of discretion.'" See *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 242; 635 NW2d 379 (2001), quoting *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.313(B) permits a trial court to impose sanctions for failure to comply with a discovery order. The court rule is inapplicable "in the absence of a discovery order." *Brenner v Kolk*, 226 Mich App 149, 159; 573 NW2d 65 (1997). Nonetheless, "[a] trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2002), citing *MASB-SEG Property/Casualty Pool, Inc*, 231 Mich App at 400.

Spoliation can occur in the absence [*8] of a discovery order. *Brenner*, 226 Mich App at 160. Spoliation of evidence occurs when a party either deliberately or accidentally destroys or loses crucial evidence, or when a party fails to preserve such evidence when it is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action. *Id.* The litigant is under such a duty "[e]ven when an action has not been commenced and there is only a potential for litigation[.]" *Id.* at 162.

An appropriate consequence for a party's failure to preserve evidence may be "an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence." *Brenner*, 226 Mich App at 161. Here, plaintiffs argue that the trial court should have drawn such an adverse inference in determining the parties' cross-motions for summary disposition. Plaintiffs further argue that the effect of this inference would be for the trial court to conclude that AAA intentionally issued the 2003-2004 policy with knowledge of Henia's death. Plaintiffs have not provided this Court with an example of the application of an "adverse inference" in the context of a motion for summary disposition under MCR 2.116(C)(10). [*9] This Court is not obligated to discover and rationalize the basis for a party's claims. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). From our review of the case law, this issue has not been squarely addressed. But there is support for applying an adverse inference, in appropriate circumstances, in the summary disposition context. See *Banks v Exxon Mobil*, 477 Mich 983, 984; 725 NW 2d 455 (2007) (Marilyn J. Kelly, J., concurring). Even assuming that these "adverse inference" principles apply in a summary disposition context, however, we conclude that the trial court did not err by failing to conclude that AAA intentionally issued the 2003-2004 policy with knowledge of Henia's death.

As a threshold matter, we note that AAA should have preserved any files related to the 2003-2004 policy, rather than allow them to be purged from its computers after six years. AAA's own record retention policy allowed for a "litigation hold" to be placed on information when it was informed of pending litigation. Although AAA argues that plaintiffs never specifically requested an "underwriting file" until more than six years after the accident, the record shows that (1) AAA was informed of [*10] the accident in 2006, (2) AAA knew there was an issue surrounding the death of Henia and the renewal of the policy in 2006, (3) plaintiffs commenced a garnishment action related to the 2003-2004 policy in 2006, (4) AAA received interrogatories from plaintiffs requesting documents relating to premium payments after Henia's death and any claims paid on behalf of Michael and (5) these interrogatories were received prior to the six-year deadline. The record is sufficient for this Court to conclude that AAA knew or should have known that there was a potential for litigation, and that any information relating to the 2003-2004 policy could be relevant to that litigation. *Brenner*, 226 Mich App at 160, 162. Therefore, the underwriting files, if any, should not have been purged.

However, we reject plaintiffs' argument that the trial court was obligated, because of this purge, to conclude that underwriting files existed that would conclusively prove that AAA intentionally issued the policy with knowledge of Henia's death. Plaintiffs allege that they are not seeking sanctions for the destruction of evidence, but are "seeking merely to have an adverse inference imposed against Garnishee-Appellee [*11] for destroying (whether or not with malicious intent) their underwriting file." However, plaintiffs' suggested remedy would amount to an adverse *presumption* against AAA, not a mere inference.

The presumption that unproduced evidence would have been adverse can be applied only "where there is evidence of intentional fraudulent conduct and intentional destruction of evidence." *Lagalo v Allied Corp*, 233 Mich App 514, 520; 592 NW2d 786 (1999). An adverse presumption, if unrebutted, *requires* the fact finder to "conclude that the unproduced evidence would have been adverse." *Id.* at 521. An adverse inference, by contrast, merely *permits* the fact finder to conclude that the unproduced evidence would have been adverse, the fact-finder is still "free to decide for itself." *Id.* at 521. Here, there was no evidence introduced of fraudulent conduct or intentional destruction of evidence on the part of AAA; therefore the trial court did not abuse its discretion in failing to give plaintiffs the benefit of an adverse presumption.

Further, plaintiffs do not explain how the trial court's alleged failure to give an adverse inference altered the trial court's summary disposition analysis. In the context [*12] of a motion under MCR 2.116(C)(10), the trial court was *already* required to consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and draw all reasonable inferences in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Plaintiffs have not addressed how an additional "adverse inference" would have altered the trial court's analysis under this subrule.

The trial court noted that AAA had presented evidence that it did not necessarily maintain an underwriting file on each of its accounts, and thus an underwriting file may never have existed. It further concluded that there was no evidence presented of AAA's intent to transfer the policy to Michael either individually or on behalf of his mother's estate. It then concluded that the evidence supported the inference that AAA was not on notice of Henia's death at the time it renewed the policy, because it renewed the policy in Henia's name only. Plaintiffs presented no evidence that supported the opposite inference. The existence of [*13] a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A mere possibility that the claim might be supported by evidence at trial is insufficient. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

Even drawing all reasonable inferences in favor of plaintiffs, the trial court did not err in concluding that no issue of material fact existed regarding AAA's knowledge (or lack thereof) of Henia's death at the time it renewed the policy. Plaintiffs simply did not carry their burden of coming forth with evidence to establish the existence of such a dispute. As the trial court was already required, in the context of AAA's motion, to draw inferences in favor of plaintiff, the grant of an adverse inference would not have altered this analysis. Only an adverse *presumption* would have affected the trial court's ruling; but such a sanction would have been inappropriate in light of the lack of evidence of intentional wrong-doing on the part of AAA. We therefore conclude that the trial court did not abuse its discretion [*14] in declining to apply such a presumption (whether labeled as inference or presumption) against AAA.

III. POLICY TRANSFER LANGUAGE

Next, plaintiffs argue that the trial court erred in concluding that the "Transfer of Policy" language in the policy precluded coverage. We review a trial court's interpretation of policy language de novo. *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). Although the 2002-2003 policy (in effect at the time of Henia's death) was not produced for the trial court, the parties agree that the policy contained the following language:

> 1. TRANSFER OF THE POLICY This Policy may not be transferred without our written consent. If the Named Insured dies, this Policy shall provide protection until the end of the Policy Term for (a) the surviving insured persons, (b) the personal representative of the Named Insured while acting within that capacity, and (c) a person having proper custody of insured property until a legal representative is appointed.

It is undisputed that this language provided coverage for Michael through the end of the policy period on February 4, 2003. The trial court concluded that

> [u]nder this clear language under [*15] the policy, Mr. Jablonowski could only remain an "insured person" until the end of the policy term in effect at the time of his mother's death--February 3, 2003. Inasmuch as the policy was renewed *after* Ms. Jablonowski's death and the subject accident occurred on

> April 8, 2003, there can be no coverage for the claim. The 2003-2004 declaration certificate only names Ms. Jablonowski and due to her death, Mr. Jablonowski could not possibly be named as an insured as one could not possibly reside with a deceased homeowner. Further, Plaintiff has not explained how acceptance of payments by AAA effectively transfers the policy to Mr. Jablonowski. . . .There is no evidence of consent to transfer the policy to either the name of Mr. Jablonowski individually or on behalf of his mother's estate.

Plaintiffs first argue that this language does not apply because AAA wrote a new policy for Michael with knowledge of Henia's death. This argument in part depends upon the so-called "adverse inference" to which plaintiffs allege they were entitled; as discussed above, we conclude that the application of such an adverse inference would not in any event result in the conclusion that is sought by plaintiffs. [*16] Additionally, the fact that Michael may have paid for the renewal of the policy did not provide notice to AAA of Henia's death, or function as a request for a policy transfer.

We find the case of *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 819 (2010), instructive. In *McGrath*, the defendant insured the home of the plaintiff's mother. *Id.* at 436. The plaintiff's mother developed dementia and Alzheimer's disease, and eventually her family members decided to move her to an apartment in Farmington Hills to be closer to her family and doctors. *Id.* at 437. A family member notified the defendant that the insurance bills should be sent to the Farmington Hills address, but did not otherwise notify the defendant the house was no longer used as a full-time residence. *Id.* After the house developed water damage caused by ruptured pipes in the winter, the defendant denied coverage for the damage because the house was not used as a full-time residence as required by the policy terms. *Id.* at 439. This Court determined that the mere fact of a change of billing address was not sufficient to provide notice that there was a change in occupancy of the insured property. *Id.* at 446. Specifically, [*17] we stated:

> [T]he policy places on the policyholder the responsibility to inform the insurer of a change in occupancy. Further, a person may change a billing address for myriad reasons that would not raise a suspicion that residency has changed. As one example, the children of an elderly person may decide to assume the responsibility for paying a parent's bills, and thus make arrangements for those bills to be sent somewhere other than the parent's residential address. [*Id.* at 446-447.]

We conclude that, like the defendant in *McGrath*, AAA was not placed on notice of Henia's death by the mere fact that her son paid for the renewal of the homeowner's policy. To construe Michael's renewal of the policy (in Henia's name) as a request to transfer the policy to Michael, and AAA's issuance of a new policy (in the name of his deceased mother) as written confirmation of that transfer, strains credulity, and we decline to do so. Such a construction would render the limitations on transfer found in the "Transfer of Policy" section essentially nugatory, as anyone who paid to renew an insured's policy could then claim that the policy was transferred to them upon renewal. We decline to interpret an [*18] insurance policy to render any part of the contract surplusage or nugatory, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 468; 663 NW2d 447 (2003), or as to produce absurd or unreasonable conditions or results, *Hastings Mut Ins v Safety King Inc*, 286 Mich App 287, 297; 778 NW2d 275 (2009).

Plaintiffs alternatively argue that the "Transfer of Policy" section is not applicable, because AAA wrote a new policy for Michael. As the parties agree that the policy only names Henia as the named insured, and contains terms identical to the previous year, and was issued in response to the payment of the amount listed on the renewal certificate, this argument is unpersuasive, to say the least. A renewal of an insurance policy is a separate contract, but (absent notice from an insurer) the coverage provided is deemed to be the same as the earlier policy. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 395; 729 NW2d 277 (2006). The record is devoid of evidence that the 2003-2004 policy was anything other than a renewal of the previous policy.

Plaintiffs' argument depends on being entitled to an adverse presumption against AAA; absent that presumption, the fact that AAA issued a renewal of [*19] the policy does not support an inference that either (1) the existing policy was transferred to Michael by written consent of AAA or (2) that a new policy was issued by AAA that provided coverage for Michael.

IV. MUTUAL MISTAKE

Plaintiffs argue that there was a mutual mistake in the issuance of the 2003-2004 policy, i.e., that Michael thought he was renewing the insurance policy and AAA thought the policy was being renewed. Therefore, plaintiffs argue, the policy should be reformed to add Michael as an insured.

Plaintiffs did not raise the argument of mutual mistake before the trial court. The issue is thus unpreserved for appeal. We are obliged only to review issues that are properly raised and preserved. *MEA v SOS*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194; 801 NW2d 35 (2011). Nonetheless, we briefly address plaintiffs' argument that they are entitled to reformation on the grounds of mutual mistake.

"'Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true [*20] intent of the parties.'" *Mate v Wolverine Mut Ins Co*, 223 Mich App 14, 24-25; 592 NW2d 379 (1998), quoting *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). However, non-parties to an insurance contract generally lack standing to seek reformation of the contract. *Id.*

Further, the mistake described by plaintiffs is not mutual. A mutual mistake of fact[1] is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). Michael may have believed he was renewing the insurance policy by paying for the renewal, but the evidence supports the inference that AAA's "mistake" was in believing that Henia was still alive. Therefore this is not an example of an instrument not expressing the true intent of the parties, because AAA never intended to provide coverage to Michael under a new or renewed policy. See *Mate*, 223 Mich App at 24-25.

1 Plaintiffs did not allege a mutual mistake of law in this case, which would not in any event support a claim for reformation. See *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 379; 761 NW2d 353 (2008) [*21] (mutual mistake of law regarding the legal effect of the contract actually made will seldom, if ever, warrant reformation).

Accordingly, even if plaintiffs had standing to seek reformation of the contract, reformation is not appropriate in this case.

V. INSURED NON-COOPERATION

Plaintiffs argue that AAA could not defend its denial of coverage on the grounds of insured non-cooperation. Indeed, AAA never asserted this defense in the action below. An insurer can obtain relief from a garnishment action if it can show it was prejudiced by its client's noncompliance. *Anderson v Kemper Ins Co*, 128 Mich App 249, 253; 340 NW2d 87 (1983). Although the trial court made passing general reference to an insurer obtaining relief from a garnishment in such a manner, it is clear that its decision in the instant case was not based on any insured non-cooperation with the defense, but rather on the determination that the policy at issue did not provide coverage for plaintiffs' claims. Plaintiffs' arguments concerning insured non-cooperation and prejudice to AAA are thus irrelevant to this appeal.

Affirmed. Having prevailed in full, AAA may tax costs. MCR 7.219(A).

/s/ Kurtis T. Wilder

/s/ Elizabeth L. Gleicher

/s/ [*22] Mark T. Boonstra

In the Matter of:
KINGSLEY/TRAVERSE CITY ADULT EDUCATION CONSORTIUM,
Public Employer,
-and-
MICHIGAN FEDERATION OF TEACHERS,
Petitioner.

Case No. R86 L-371

14

**II. Procedure and Evidence**
**B. Representation Cases—Procedure**
**5. Consent Election Agreement**

[1] Excluded or Omitted Classifications—Election Barred Within Certification Year—Petitions Filed Within Final 60 Days Can be Processed.
Commission holds policy underlying Section 14 of PERA, which bars elections within certification year, applies broadly to processing multiple petitions in same year, so that union could not omit employees from bargaining unit to avoid contested hearing and subsequently file another petition. Both accretion and unit clarification petitions have historically been dismissed under such circumstances. Here, accretion petition was filed more than 60 days prior to expiration of certification year, and Commission dismisses accordingly. However, petitions filed less than 60 days before certification year expires will be processed, but no election can be scheduled until after 12 full months have elapsed since certification. (PERA)

**III. Representation Petition Issues**
**E. Other Bars to Election or Petition**
**5. Twelve-month Rule**

[2] Excluded or Omitted Classifications—Election Barred Within Certification Year—Petitions Filed Within Final 60 Days Can be Processed.
[*Same text as headnote No. 1 above.*]

Appearances:
For the Public Employer: Thrun, Maatsch and Nordberg, P.C., by James T. Maatsch, Esq.
For the Petitioner: Miller, Cohen, Martens, and Ice, P.C., by Mark H. Cousens, Esq.

DECISION AND ORDER

Pursuant to the provisions of Section 12 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.[2]12, MSA 17.455(12), this matter came on for hearing at Lansing, Michigan, on March 17, 1987, before Bert H. Wicking, an ALJ for the Michigan Employment Relations Commission. Based upon the entire record in this matter, including briefs filed by the parties on or before May 28, 1987, the Commission finds as follows:

On December 17, 1986, the Michigan Federation of Teachers filed a petition for election with the Commission requesting that a representation election be conducted to determine whether or not the Special Projects Coordinator and the Alternative Education Coordinator of the Kingsley/Traverse City Adult Education Consortium wished to be represented by the Petitioner for purposes of collective bargaining with the Employer. It seeks to accrete these positions to Petitioner's existing unit of adult education teachers.

FACTS. The petition in this case was filed approximately 3 months after a consent election agreement was signed in Case No. R86 C-123. On August 29, 1986, the Employer, the Petitioner in the instant case and the Michigan Education Association entered into an agreement in that case which described the bargaining unit as:

> All full-time and regularly employed part-time teachers in the adult education program administered by the Kingsley/Traverse City Adult Education Consortium, excluding nurse, substitutes and supervisors such as, but not necessarily limited to, the Director, the Assistant Director, Coordinator of Alternative Education Program, Special Projects Coordinator and all others.

The Education Association and Petitioner objected to the exclusion of the Special Projects Coordinator and Alternative Education Coordinator from the unit at the time of the consent election. However, Petitioner agreed to the exclusion of the positions because it did not want to hold up an election in the rest of the unit. Petitioner indicated that a petition to accrete the Special Projects Coordinator to the bargaining unit would be filed if Petitioner was certified as bargaining representative. In an election held on October 27, 1986, Petitioner was selected as the bargaining representative for this unit.

The Special Projects Coordinator testified as to her duties in the instant case. The Director of the Consortium testified to the duties of both the Special Projects Coordinator and the Coordinator of Alternative Education.

The Special Projects Coordinator coordinates the Employer's high school completion and adult basic education programs, including classes for single mothers and pregnant teems. [*sic*] There are ten teachers in these programs. The Special Projects Coordinator does not herself teach, although she may substitute from time to time. It is the

responsibility of the Special Projects Coordinator to insure that these special programs and their students do not interfere with the normal operation of classes being held at the same time in school buildings. The Special Projects Coordinator regularly meets with building principles [*sic*] to review programs. The Special Projects Coordinator also calls and conducts staff meetings. The Special Projects Coordinator also assists teachers in finding substitutes. The Special Projects Coordinator reports directly to the Director of the Consortium.

The Special Projects Coordinator testified that she has never interviewed applicants for adult education positions and has never been asked for her recommendation on hiring. She testified that she has never evaluated teachers, although she has been told that eventually she might be asked to do so. She was sent to a training program by the Employer in part to assist her in learning how to do this. The Special Projects Coordinator testified that she has never disciplined or recommended discipline for teachers.

The current job description of the Special Projects Coordinator states that she is to assist the Director and Assistant Director with evaluation, as assigned. The Director testified that although the Special Projects Coordinator has not yet been required to evaluate teachers, she would be required to do formal evaluations for all teachers under her supervision by the end of this year. The Director also testified that although the Special Projects Coordinator had not participated in hiring in the past, her job duties had been expanded so that the next time a teacher in adult education was hired the Special Projects Coordinator would be on the hiring committee. The Director also testified that the Special Projects Coordinator is responsible for discipline and the recommendation of discipline for teachers.

The Alternative Education Coordinator coordinates the alternative education program, a program for high school students having difficulty in the regular program. The Alternative Education Coordinator teaches two classes each day, serving as coordinator during the remainder of the day. The Alternative Education Coordinator monitors student attendance and discipline. The Alternative Education Coordinator also serves as liaison with other agencies. He maintains student files, obtains supplies for instructors and conducts weekly staff meetings.

The Alternative Education Coordinator's job description also provides that he is to assist the Director and Assistant Director with evaluation of staff. According to the Director, the Alternative Education Coordinator had not yet completed any formal evaluations as of the date of the hearing, but was in the process of preparing them. The Director also testified that the Alternative Education Coordinator had the authority to effectively recommend discipline short of discharge for



teachers in his program. The record indicated that the previous Alternative Education Coordinator participated, along with a teacher and the Director and Assistant Director, in interviewing teacher applicants for the alternative education program.

POSITIONS OF THE PARTIES. The Employer urges that the accretion petition be dismissed because a consent election held within 12 months of the filing of this accretion petition which excluded the positions of Special Projects Coordinator and the Alternative Education Coordinator from the bargaining unit. A review of the merits of the accretion petition as to whether the positions are supervisory or not is inappropriate by virtue of MERC's statutory 12-month election bar and MERC case law which establishes that the consent election agreement is binding upon the parties—according to the Employer. The Employer also asserts that both positions are supervisory and should be excluded from the unit on this basis.

The Petitioner acknowledges that an election cannot be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The 12-month prohibition does not apply in the instant case, however, according to the Petitioner, because the positions sought now were not part of the bargaining unit within which the consent election was held.

The Petitioner also argues that the positions are not supervisory in the labor relations sense so as to exclude them from the bargaining unit because have no actual authority to effectively recommend layoff, discharge, promotion, transfer, or discipline of bargaining unit employees.

DISCUSSION AND CONCLUSIONS. Section 14 of PERA provides, in part, that:

> An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period a valid election was held.

**[1]** In *Lansing Community College*, 1979 MERC Lab Op 1180, we applied the above rule to dismiss an accretion petition filed by a union shortly after that union had been certified as the bargaining agent. In the consent negotiations on the first petition, the union and the employer had disagreed as to the supervisory status of several positions. The union signed a consent agreement excluding the positions in order to avoid further litigation and obtain a quick election. We concluded that he [*sic*] underlying policy of the election bar rule was to avoid the processing of multiple petitions in the same year, and that policy considerations did not favor permitting the union to omit employees from the unit merely to avoid hearing and then immediately file another petition. Despite the fact that the election bar rule did not literally bar the

petition because the employees sought in the second petition were not part of the unit in which the election was conducted, we concluded that the petition should be dismissed because the union had had the opportunity in the previous case to have the supervisory status of these employees determined by MERC.

We have also dismissed unit clarification petitions filed under similar circumstances. *See City of Rockford*, 1980 MERC Lab Op 459; *Oakland County Sheriff's Dept*, 1978 MERC Lab Op 1283.

We believe that the same policy considerations which mandated the dismissal of the petition in *Lansing Community College* compel the dismissal of the petition here.

[2] As indicated above, Petitioner in the instant case had the opportunity to litigate the supervisory status of the Special Projects and Alternative Education Coordinator in Case No. R86 C-123. Their agreement to exclude the positions from their unit in that case precludes them from seeking to represent these employees for a period of 12 months after the date of election in this case. We note that more than 12 months have now elapsed since the election in Case No. R86 C-123 held on October 27, 1986. However, a petition filed more than 60 days prior to the expiration of the 12-month period after an election is dismissed.[1] Since the petition in the instant case was filed more than 60 days prior to October 17, 1987, no election should be directed pursuant to this petition.

The petition is, accordingly, dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION
David S. Tanzman, Chairman
Morris Milmet, Member
Anne T. Patton, Member

Dated: January 25, 1988

1. Petitioners [*sic*] found [*sic*] less than 60 days before the expiration of the 12-month period are processed; however, no election can be scheduled before the 12-month period has elapsed. See policy enacted May 5, 1983.

**MICHIGAN AFSCME COUNCIL 25 and LORETTA BATES, Plaintiffs-Appellants, v LIVINGSTON COUNTY ROAD COMMISSION and MICHAEL R. KLUCK, Defendants-Appellees.**

**No. 274665**

COURT OF APPEALS OF MICHIGAN

2007 Mich. App. LEXIS 2544

November 13, 2007, Decided

**NOTICE:** THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**PRIOR HISTORY:** [*1]
Livingston Circuit Court. LC No. 06-022295-CK.

**DISPOSITION:** Affirmed.

**JUDGES:** Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.



**OPINION**

PER CURIAM.

Plaintiffs, Michigan AFSCME Council 25 and Loretta Bates, appeal as of right the grant of summary disposition in favor of defendants, Livingston County Road Commission and Michael R. Kluck. We affirm.

On April 25, 2005, the Livingston County Road Commission (hereinafter "Road Commission") conducted an investigation involving two employees at their garage in Brighton, Michigan. The investigation pertained to derogatory remarks printed next to a newspaper photograph of a Road Commission supervisor posted in the garage. As part of the investigation, the Road Commission interviewed the two employees assigned to that location, Jerry Hoskins and Russell Carpenter. Present for the interviews were Steve Wasylk, Director of Operations for the Road Commission, Michael R. Kluck, the Road Commission's attorney, and Loretta Bates as a union representative for Michigan AFSCME Council 25 (hereinafter "Union").

Following denial of responsibility by Carpenter and Hoskins, the Road Commission obtained writing samples from the two employees. Based on comparisons by a forensic document [*2] analyst, it was determined that Carpenter wrote the remarks and his employment was terminated for gross insubordination and dishonesty on May 9, 2005.

Carpenter subsequently filed an application for unemployment benefits with the Michigan Employment Security Commission ("MESC"). At the benefits hearing Bates, testifying pursuant to a subpoena, acknowledged that she advised Carpenter to deny any allegations in order to permit the Union sufficient time to "put things together." Specifically, in response to questioning at the MESC hearing, Bates testified:

> *Q.* Ms. Bates, at the investigatory interview- -if I understood your testimony correctly, you told Mr. Carpenter to lie, is that correct?
>
> *A.* Yeah- -yeah, more or less.

Following the conclusion of Carpenter's MESC hearing, the Road Commission initiated a separate, independent investigation into the conduct of Bates. Based on Bates' admission that she counseled Carpenter to lie, the Road Commission terminated her employment for dishonesty on January 26, 2006. On that same day, the Union filed a grievance alleging Bates' wrongful termination, which was denied on February 6, 2006.

Significantly, the Union and Road Commission were parties to [*3] a collective bargaining agreement, which was in effect from October 1, 2001 to September 30, 2004. While the parties attempted to negotiate a successor agreement, the contract was extended on a day-to-day basis through December 28, 2004. Because the parties had reached an impasse in negotiations, the contract was deemed to have expired after December 28, 2004.

On July 25, 2006, the Union filed a civil complaint against the Road Commission and Kluck alleging (1) breach of contract, (2) violation of MCL 421.11(b)(1) asserting the wrongful or prohibited use of certain disclosures or information obtained in the MESC hearing, and (3) civil conspiracy between the Road Commission and their attorney in the violation of the cited statute. The Road Commission and Kluck filed motions for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8), alleging lack of subject matter jurisdiction and failure to state a claim for which relief could be granted. Shortly before the scheduled hearing, the Union filed a motion to amend the complaint to add Bates as a party and to include a proposed new count for "violation of public policy." The Road Commission and Kluck filed a motion to strike the amended [*4] complaint and the matter proceeded to hearing on October 31, 2006.

Addressing Kluck's motion for summary disposition, the trial court noted that "Defendant Kluck is not a party to the collective bargaining agreement" entitling him to summary disposition on the breach of contract count. In reference to the second count, alleging violation of MCL 421.11(b)(1), the trial court granted summary disposition in favor Kluck because it did "not find that that particular statute covers the situation here where Ms. Bates was neither the employee nor the employer." The trial court determined that the civil conspiracy count must also fail because Kluck was acting as an agent of the Road Commission and, therefore, "you don't really have the two persons necessary to create such a conspiracy."

Considering the Road Commission's motion for summary disposition, the trial court dismissed plaintiffs' complaint in its entirety, stating in relevant part:

> [T]his Court does find that this particular claim lies within the jurisdiction of the Michigan Employment Relations Commission, MERC, . . . because the allegation as set forth . . . as to the breach of contract, really an allegation of an unfair labor practice [*5] under PERA, and . . . is an issue for MERC to decide and not this Court.

The trial court dismissed the conspiracy charge based on its determination that a civil conspiracy could not exist due to the absence of the number of persons necessary to establish a conspiracy.

The count pertaining to violation of MCL 421.11(b)(1) was dismissed against the Road Commission based on the trial court's finding that plaintiffs had failed to state a cause of action. Addressing the violation of public policy claim the trial court granted summary disposition, ruling:

> [W]hether you deal with it as a motion to strike or otherwise, it lacks merit for the reasons I've stated on the record previously. I would also point out without dealing with it in any great detail, I also agree with [the] argument that under a (C)(8), even if this Court has jurisdiction, I would find no cause of action as to any of the counts as to any of the parties. So therefore, I do grant summary disposition and I do dismiss this lawsuit then.

This Court reviews de novo motions brought under MCR 2.116(C)(4). *Cork v Applebee's of Michigan, Inc,* 239 Mich. App. 311, 315; 608 N.W.2d 62 (2000). "When viewing a motion under MCR 2.116(C)(4), [*6] this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg,* 231

Mich. App. 256, 258; 586 N.W.2d 103 (1998). "All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true." *Id.* Summary disposition is appropriate only if the plaintiff's claim "is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

Plaintiffs contend the trial court erred in determining that the MERC had exclusive jurisdiction over plaintiffs' claims. Plaintiffs assert the "just cause" provision of the collective bargaining agreement remained in effect at the time of Bates' termination. As a result, plaintiffs argue that the filing of a breach of contract action in circuit court to enforce the "just cause" provision of the contract was valid and appropriate. Further, [*7] plaintiffs assert on appeal that an "implied-in-fact" contract existed permitting their pursuit of a remedy in circuit court.

Defendants respond by arguing that plaintiffs are wrongfully attempting to assert a contract right, which can no longer exist due to expiration of the collective bargaining agreement. Defendants specifically note that Bates was terminated more than 12 months after the expiration of the contract and well after the parties had purportedly reached an impasse in negotiations. In addition, defendants assert that plaintiffs are wrongfully attempting to transform a labor dispute into a breach of contract claim. According to defendants, regardless of the label applied by plaintiffs to their claim, the true nature of the complaint is that of a pure labor dispute and, thus, within the exclusive province of the MERC to resolve.

The parties do not dispute that the Road Commission is a governmental employer and as such is governed by the Michigan Public Employment Relations Act ("PERA"), MCL 423.201 *et seq.* In addition, the parties concur that the Union is a labor union, certified by the MERC, and includes among its members Bates, who was functioning as an officer of the [*8] Union and in her capacity as a union representative when the events complained of in this litigation occurred.

Consistent with the mandates of PERA, when a labor contract expires, a public employer has a continuing duty to bargain in good faith to obtain a new contract with regard to "wages, hours, and other terms and conditions of employment." MCL 423.215. Such conditions of employment are deemed "mandatory subjects" of bargaining, which "survive the contract by operation of law during the bargaining process." *Local 1467, Int'l Assoc of Firefighters, AFL-CIO v City of Portage,* 134 Mich. App. 466, 472; 352 N.W.2d 284 (1984). It is well recognized that neither party to an agreement may take unilateral action on a mandatory bargaining subject unless an impasse has been reached in contract negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ,* 404 Mich. 268, 277; 273 N.W.2d 21 (1978). If an employer violates the prohibition against unilateral action on a mandatory bargaining subject before an impasse occurs, an unfair labor practice has been committed. MCL 423.210(1)(e); MCL 423.216(a).

The crux of plaintiffs' assertion is that defendants improperly took unilateral [*9] action following expiration of the collective bargaining agreement and changed Bates' conditions of employment by failing to maintain the "just cause" requirement for termination. Plaintiffs' imply that termination of Bates' employment constituted a violation of Bates' statutory right, as a member of the Union, to engage in a protected activity, in violation of MCL 423.209, which provides:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Either claim places jurisdiction squarely within the purview of the MERC.

It is consistently acknowledged that:

> PERA is the exclusive remedy for any unfair labor practice charge, and the MERC has exclusive jurisdiction to adjudicate such charges. A plaintiff cannot obtain another remedy by framing the unfair labor practice as a different species of common-law or statutory claim invoking the jurisdiction of a different tribunal. If the allegations [*10] forming the plaintiff's cause of action implicate an unfair labor practice question, the claim is barred by the MERC's exclusive jurisdiction. [*Kent Co Deputy Sheriffs' Assoc v Kent Co Sheriff,* 238 Mich. App. 310, 325; 605 N.W.2d 363 (2000), aff'd in part and remanded in part on other grounds 463 Mich. 353 (2000).]

Ultimately, the issue to be resolved is whether defendants improperly altered Bates' working conditions by denying her "just cause" protection and terminating her employment because of her conduct as a union representative. As such, the actual underpinnings of this complaint can only be construed as an unfair labor dispute, which must be brought before the MERC as the forum having exclusive jurisdiction. Therefore, the trial court's dismissal of plaintiffs' breach of contract claim based on a lack of subject matter jurisdiction was proper.

In addition, plaintiffs' contend their petition to the circuit court was proper because defendants violated an "implied-in-fact" contract. We acknowledge that courts do recognize the existence of an implied contract "where parties assume obligations by their conduct." *Williams v Litton Sys, Inc,* 433 Mich. 755, 758; 449 N.W.2d 669 (1989). [*11] A contract implied in fact is deemed to arise "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore." *In re McKim Est,* 238 Mich. App. 453, 458; 606 N.W.2d 30 (1999) (citation omitted).

Plaintiffs' contention regarding an implied-in-fact contract cannot survive based on plaintiffs' failure to plead a claim for breach of implied contract in either their original or amended complaints. The complaint referred only to the provisions of the collective bargaining agreement in the assertion of a contract breach. In addition, the past conduct of the parties, regarding continued adherence to provisions contained in the expired collective bargaining agreement, is insufficient to create an implied-in-fact contract.

The elements necessary to establish an implied contract include: (1) parties competent to contract, (2) a proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit,* 181 Mich. App. 121, 127; 449 N.W.2d 115 (1989). In particular, the requirement of mutual assent, defined as a "meeting of the minds" on all material facts, *Kamalnath v Mercy Hosp,* 194 Mich. App. 543, 548-549; 487 N.W.2d 499 (1992), [*12] must be demonstrated to establish the elements of an implied contract. *Pawlak v Redox Corp,* 182 Mich. App. 758, 765; 453 N.W.2d 304 (1999) (citation omitted). Plaintiffs failed to assert or put forth any evidence in support of their belief that the parties had attained an agreement regarding the imposition of a just cause termination requirement. Contrary to plaintiffs' assertion that an implied-in-fact contract was formed, in reality an impasse had been reached in the negotiations to achieve a new collective bargaining agreement. This impasse belies plaintiffs' assertion that a "meeting of the minds" necessary to establish an implied-in-fact contract requiring "just cause" for employment termination could have occurred.

The trial court's dismissal of plaintiffs' claim for breach of contract against Kluck was also proper. In order to establish a claim for breach of contract, a plaintiff must establish both the elements of the contract and its breach. See *Pawlak, supra* at 765. Kluck served as the attorney for the Road Commission. As an individual and agent of the Road Commission, Kluck lacked the legal capacity to be a party to the collective bargaining agreement or any alleged employment [*13] contract. In the absence of contractual privity, the liability of an attorney to a third party "is limited to cases involving fraud, collusion, or malicious prosecution," which have not been alleged by plaintiffs in reference to the breach of contract claim. *Schunk v Zeff & Zeff, PC,* 109 Mich. App. 163, 179; 311 N.W.2d 322 (1981).

Plaintiffs next argue that defendants violated the prohibitions of MCL 421.11(b)(1) by using information obtained during Carpenter's MESC hearing to subsequently terminate Bates. Defendants further contend that the improper use of this information constituted a violation of public policy and a civil conspiracy between the Road Commission and Kluck.

MCL 421.11 governs administration of the Michigan Employment Security Act, MCL 421.1 *et seq.* MCL 421.11(b)(1) states, in relevant part:

> Information obtained from any employing unit or individual pursuant to the administration of this act, and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or open to public inspection other than to public employees in the performance of their official duties under this act in any manner revealing the individual's or [*14] the employing unit's identity.

MCL 421.11(b)(1)(*iii*) further indicates that "the information and determinations shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceeding." Plaintiffs additionally cite to the language of MCL 421.11(b)(1)(*iv*), which provides:

> Any report or statement, written or verbal, made by any person to the commission, any member of the commission, or to any person engaged in administering this act is a privileged communication, and a person, firm, or corporation shall not be held liable for slander or libel on account of a report or

> statement. The records and reports in the custody of the commission shall be available for examination by the employer or employee affected.

Plaintiffs contend that these statutory provisions preclude defendants' use of Bates' statements at the MESC hearing to terminate her employment.

At the outset, we note that many of the cases cited by plaintiffs in support of their position are federal court rulings, which do not specifically involve or address the MERC or PERA. "While federal precedent may often be useful as guidance in [*15] this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis." *Garg v Macomb Cty Community Mental Health Services,* 472 Mich. 263, 283; 696 N.W.2d 646 (2005).

"When construing statutory provisions, the task of this Court is to discover and give effect to the intent of the Legislature. Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no further interpretation is necessary." *Storey v Meijer, Inc,* 431 Mich. 368, 376; 429 N.W.2d 169 (1988) (citations omitted). Rather than provide the broad rights of confidentiality and privilege asserted by plaintiffs, the statute is restricted in scope and only prohibits "*the use of MESC information and determinations* in subsequent civil proceedings unless the MESC is a [*16] party or complainant in the action." *Id.* (emphasis added). This is consistent with the purpose of MCL 421.11(b)(1), which has been construed "less as a personal privilege than a systemic policy" intended to "support expeditious and nonadversarial unemployment proceedings." *Paschke v Retool Industries,* 445 Mich. 502, 516, 518 n 15; 519 N.W.2d 441 (1994). As a result, the statutory provisions are inextricably linked to claimant or employer rights and have been interpreted only to preclude "representations made before the MESC" from being "used to estop claims in other forums." *Id.* at 447.

Contrary to plaintiffs' contention regarding the existence of an absolute privilege, case law does not address testimony by a witness at these proceedings other than to prohibit statements, such as those made by Bates to the Commission, from being used to establish liability for "slander or libel." MCL 421.11(b)(1)(*iv*). Defendants used the testimony of Bates as a witness. They did not misuse information or determinations by the MESC regarding a claimant's benefit rights. Consistent with the proscriptions imposed by MCL 421.11(b)(1)(*iii*), the information was not used in a subsequent court or administrative [*17] proceeding. Finally, MCL 421.11(b)(1)(*iv*) specifically contradicts plaintiffs' assertion of confidentiality of information obtained within the hearings by mandating the accessibility of the Commission's "records and reports . . . for examination by the employer or employee affected."

Plaintiffs further plead the existence of a civil conspiracy involving the Road Commission and its attorney. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co,* 194 Mich. App. 300, 313; 486 N.W.2d 351 (1992). It is well recognized that "[a]n allegation of conspiracy, standing alone is not actionable." *Magid v Oak Park Racquet Club Assoc, Ltd,* 84 Mich. App. 522, 529; 269 N.W.2d 661 (1978). A plaintiff "must allege a civil wrong resulting in damage caused by the defendants." *Id.* Based on our determination that plaintiffs cannot sustain their breach of contract action and that MCL 421.11 was not violated, plaintiffs are unable to demonstrate a civil conspiracy as a conspiracy cannot exist absent the showing of an illegal act. [*18]

In addition, with reference to Kluck, there can be no conspiracy if he was acting as an agent of the Road Commission within the scope of their agency agreement. In *Blair v Checker Cab Co,* 219 Mich. App. 667; 558 N.W.2d 439 (1996), this Court ruled that "an agent or employee cannot be considered a separate entity from his principal or corporate employer, respectively, as 'long as the agent or employee acts only within the scope of his agency [or] employment.'" *Id.* at 674 (citation omitted). "An attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority." *Uniprop, Inc v Morganroth,* 260 Mich. App. 442, 447; 678 N.W.2d 638 (2004). Because plaintiffs have failed to demonstrate that Kluck was acting in any capacity other than as an agent of the Road Commission, the trial court properly dismissed this claim.

Finally, we find that plaintiffs' assertion of a public policy violation is indistinguishable from their claim regarding violation of MCL 421.11(b)(1). Plaintiffs' allegation merely restates that defendants "through their concerted actions have violated Michigan public policy that protects individuals [*19] who testify before the MESC." They fail to specify any distinction from their assertion that Bates' testimony before the MESC was "confidential and/or privileged" when claiming violation of MCL 421.11(b)(1). As such, the allegation constitutes merely the same claim under a separate guise and was properly dismissed by the trial court for the reason that defendants' actions were not a violation of MCL

421.11(b)(1). Plaintiffs further assert Kluck's alleged admission that "an employer should not terminate an employee for testimony given at the MESC" precludes summary disposition on their public policy violation claim. As noted by the trial court, this admission could not "confer . . . subject matter jurisdiction where it does not exist." Finally, because the trial court granted summary disposition in accordance with MCR 2.116(C)(8), which is based solely on the pleadings, dismissal of plaintiffs' claims was appropriate.

Affirmed.

/s/ Michael J. Talbot

/s/ E. Thomas Fitzgerald

/s/ Kirsten Frank Kelly

**KIMBERLY WISE, Petitioner-Appellee, v MICHIGAN CIVIL SERVICE COMMISSION, Respondent-Appellant.**

**No. 268675**

**COURT OF APPEALS OF MICHIGAN**

**2007 Mich. App. LEXIS 1996**

**August 23, 2007, Decided**

**NOTICE:** THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**PRIOR HISTORY:** [*1]
Wayne Circuit Court. LC No. 05-524180-AE.

**DISPOSITION:** Reversed.

**JUDGES:** Before: Davis, P.J., and Schuette and Borrello, JJ.



**OPINION**

PER CURIAM.

Respondent appeals by leave granted from a circuit court order reversing respondent's decision and reinstating petitioner's employment with the Michigan Department of Corrections. We reverse.

Petitioner was employed as a resident unit officer by the Michigan Department of Corrections ("MDOC") as a resident unit officer, which is a classified civil service position governed by the civil service rules and regulations promulgated by respondent. She was also a member of the Michigan Corrections Organization, Service Employees International Union ("MCO"), the labor relations representative for corrections workers in Michigan. The MCO entered into a collective bargaining agreement with the MDOC. In 2003, the MDOC discovered evidence of improper contact between petitioner and a prisoner who had recently been transferred from the facility where petitioner worked to another facility. Petitioner denied, and continues to deny, any of the contacts. The MDOC held a disciplinary conference and found that petitioner had violated its Work Rule 46, prohibiting "over familiar" conduct with [*2] a prisoner. In December 2003, the MDOC formally terminated petitioner's employment.

Pursuant to Article 9 of the collective bargaining agreement, the MCO filed a grievance on petitioner's behalf. The grievance proceeded to arbitration, where the MCO argued that the evidence of misconduct was unreliable, that termination was excessively harsh and based on a failure to consider mitigating factors, and that no punishment could be imposed because the MDOC had failed to use the required manner of providing her with notice. The arbitrator found the evidence reliable and that consideration of the mitigating and aggravating factors supported termination. Article 10(E) of the collective bargaining agreement required disciplinary actions to "be initiated within forty-five (45) calendar days from the date of the disciplinary conference;" specified that "[f]ormal notification to the employee of the disciplinary action shall be in the form of a letter or form spelling out charges and reasonable specifications;" and specified that if notice was not personally given to the employee, "the notice shall be sent to the employee by certified mail, return receipt requested, at the last address he/she provided [*3] the Employer." The arbitrator found that, although the MDOC had sent notice to petitioner using only noncertified overnight mail, the agreement should not be construed to cause a forfeiture of the MDOC's right to impose discipline; and it should not be construed to reach harsh, unreasonable, or

absurd results. The arbitrator therefore upheld the termination. The MCO did not seek further administrative or judicial relief.

Petitioner then exercised her rights under Civil Service Rule ("CSR") 6-3.5(a), which permits "[a]ny person" to "file a complaint with the state personnel director that a collective bargaining agreement, arbitrator's decision, or settlement agreement under a collective bargaining agreement has been applied or interpreted to violate or otherwise rescind, limit, or modify a civil service rule or regulation governing a prohibited subject of bargaining." The prohibited subjects of bargaining are listed in CSR 6-3.2, which also provides that an "arbitrator's decision under a collective bargaining agreement cannot be interpreted or applied to violate, rescind, limit, or modify a civil service rule or regulation governing a prohibited subject of bargaining." CSR 6-3.2(a)(1). [*4] Petitioner specifically contended that the arbitrator had violated CSR 6-3.2(b)(8), which provides as follows:

> The system of collective bargaining created in the civil service rules, the bargaining relationships authorized in the rules, and the limitations, restrictions, and obligations on the collective bargaining parties, collective bargaining agreements, and eligible employees established in the civil service rules and regulations.

Petitioner argued that the arbitrator had exceeded his authority by ignoring or misconstruing the unambiguous terms of the collective bargaining agreement; and furthermore, the arbitrator improperly relied on unreliable, circumstantial, or nonexistent evidence. The state personnel director denied the appeal for lack of subject-matter jurisdiction. The state personnel director explained that a complaint under CSR 6-3.5(a) required an allegation that a *civil service rule or regulation* was violated, but petitioner's complaint alleged only a violation of the collective bargaining agreement.

Petitioner then sought to appeal the personnel director's decision to respondent, pursuant to CSR 6-3.5(c), which provides as follows:

> A party to the collective bargaining [*5] agreement who is aggrieved by a final decision of the state personnel director may file an application for leave to appeal to the civil service commission within 28 calendar days after the decision is issued.

Respondent dismissed the appeal, stating that CSR 6-3.5(c) only permitted parties to the collective bargaining agreement to seek appeals from decisions of the state personnel director. Respondent interpreted "parties" to refer only to the union and the employer, in this case the MCO and the MDOC. According to respondent, individual union members like petitioner were not "parties to the collective bargaining agreement." Therefore, respondent concluded that petitioner lacked standing to appeal.

Petitioner appealed respondent's summary dismissal to the circuit court. The circuit court concluded that respondent had misinterpreted the civil service rules when it determined that an individual union member is not a "party" to the collective bargaining agreement within the meaning of CSR 6-3.5(c). Relying on MCL 600.1405, the court determined that union members are third-party beneficiaries to a collective bargaining agreement for purposes of applying CSR 6-3.5(c). The circuit court also [*6] addressed the merits of petitioner's claim and concluded that she was improperly terminated from her employment. The circuit court ordered that she be reinstated. Respondent now appeals.

Respondent is a constitutionally created administrative agency vested with the authority to "make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service." Const 1963, art 11, § 5; *Davis v Dep't of Corrections*, 251 Mich App 372, 377; 651 NW2d 486 (2002). Respondent "is vested with plenary and absolute authority to regulate the terms and conditions of employment in the civil service." *Id.* Consistent with respondent's plenary authority, the Michigan Constitution provides that the Legislature "may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*" Const 1963, art 4, § 48 (emphasis added). As discussed, petitioner was in the state classified civil service. She is therefore "subject to the grievance procedure for the classified service." *Womack Scott v Dep't of Corrections*, 246 Mich App 70, 78; 630 NW2d 650 (2001). "If a party desires to challenge an adverse [*7] CSC decision or ruling, the review process involves a direct appeal to the circuit court." *Id.*, 79.

"Judicial review of decisions of the Civil Service Commission is established by the Revised Judicature Act," MCL 600.631. *Boyd v Civil Service Comm*, 220 Mich App 226, 232; 559 NW2d 342 (1996). The circuit court conducts a "direct review" to determine whether the CSC's challenged action was authorized by law and was supported by

competent, material, and substantial evidence. *Id.* Our review of the circuit court's review of an agency action is even more limited: we only "determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Id.*, 234. This standard is substantively indistinguishable from the clear error standard of review. *Id.* at 234-235. A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Id.* at 235.

The challenged agency action is the summary dismissal of petitioner's application for leave to appeal for lack of standing. The threshhold issue on appeal is therefore [*8] whether petitioner is a "party to the collective bargaining agreement" and therefore entitled to appeal the state personnel director's decision pursuant to CSR 6-3.5(c). The civil service rules provide no other recourse for appealing a denial of a complaint by the state personnel director.

We first find that petitioner is not a party to the collective bargaining agreement. The collective bargaining agreement was made between the MCO and the MDOC. *Barron's Law Dictionary* (1984) defines "party" as "a person or entity that enters into a contract, lease, deed, etc." Black's Law Dictionary (8th ed) defines "party" as "[o]ne who takes part in a transaction <<a party to the contract>." *Random House Webster's College Dictionary* (2001) defines "party" in relevant part as "a person or group that participates in some action, affair, or plan" or as "a signatory to a legal instrument." Petitioner did not negotiate, sign, or otherwise personally enter into the collective bargaining agreement. She is therefore not a "party" to it. See also, *Markarian v Roadway Express, Inc*, 56 Mich App 43, 44; 223 NW2d 356 (1974) (holding that the plaintiff-employee was "not per se a party" to the collective bargaining [*9] agreement between his employer and his union, although he might have an independent action against his employer).

A reviewing court should give deference to an agency's interpretation of its own rules. *Thomas Twp v John Sexton Corp of Michigan*, 173 Mich App 507, 514; 434 NW2d 644 (1988). An agency's legal rulings also are entitled to "deference, provided they are consistent with the purpose and policies of the statute in question." *Adrian School Dist v Michigan Pub School Employees' Retirement Sys,* 458 Mich 326, 332; 582 NW2d 767 (1998). They will be set aside only "if they violate the constitution or a statute or contain a substantial and material error of law." *Id.* It appears that respondent's interpretation of the definition of a "party to the collective bargaining agreement" in this case is consistent with the plain language of CSR 6-3.5(c). If respondent had intended to allow individual union members the right to appeal the personnel director's decision to the commission pursuant to CSR 6-3.5(c), it easily could have used language clearly expressing that intent. For example, CSR 6-3.5(a) provides that "any person" may file a complaint with the state personnel director.

Under Article [*10] 9(D) of the collective bargaining agreement, "[e]xcept as provided in Civil Service Rules and Regulations, the decision of the Arbitrator will be final and binding on all parties to this Agreement and an Arbitration decision shall not be appealable to the Civil Service Commission." Petitioner's rights to appeal an arbitration decision under the collective bargaining agreement are therefore *only* those rights provided by the Civil Service Rules. Significantly, CSR 6-3.5 itself does not pertain to enforcement of the collective bargaining agreement in the abstract. Rather, CSR 6-3.5 is concerned with a violation of "a civil service rule or regulation governing a prohibited subject of bargaining."

Plaintiff argues that even if she is not a party to the collective bargaining agreement, she is a third-party beneficiary. The only right conferred on a third-party beneficiary under MCL 600.1405 is the right to enforce the *contract* as if he or she is a true party. Nothing in the statute suggests that a third-party beneficiary has the additional right to act as a party for the purposes of standing to enforce anything other than actual promises contained within the contract itself. We may not read [*11] into a statute anything "that is not within the manifest intent of the Legislature as gathered from the act itself." *Maier v Gen Tel Co of Michigan*, 247 Mich App 655, 662; 637 NW2d 263 (2001). Therefore, MCL 600.1405 does not affect petitioner's standing to enforce a civil service rule violation pursuant to CSR 6-3.5(c).

Because petitioner was not a party to the collective bargaining agreement, respondent properly concluded that she lacked standing to invoke the appeal procedure in CSR 6.3-5(c), and the circuit court erred in reversing respondent's dismissal of petitioner's appeal of the personnel director's decision. Accordingly, we reverse the circuit court's judgment and reinstate respondent's decision.

Reversed.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello