STATE OF MICHIGAN
COURT OF APPEALS

ANGELA STEFFKE,
REBECCA METZ, and
NANCY RHATIGAN,
individuals,

Plaintiffs/Appellants,

-v-

TAYLOR FEDERATION OF TEACHERS, AFT 1085,
an unincorporated labor union,
TAYLOR SCHOOL DISTRICT,
a public school district, and
TAYLOR PUBLIC SCHOOL BOARD OF EDUCATION,
a public school board,

Defendants/Appellees.

Court of Appeals No. 317616

Lower Court
3rd Circuit Case No. 13-002906-CK
Hon. Daphne Means Curtis

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APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

On July 24, 2013, the Third Circuit Court of Michigan, for Wayne County, refused to hear the case of three Taylor public school teachers who were subjected to a collective bargaining agreement which failed to meet the requirements for contract formation, violated the Public Employment Relations Act, and exceeded the authority of the public body which employs them. The judge dismissed their complaint for lack of subject matter jurisdiction, finding that because the matter involves the Public Employment Relations Act, that it was under the exclusive jurisdiction of the Michigan Employment Relations Commission.

The Third Circuit's dismissal of this case was a final appealable order pursuant to MCR 7.202(6)(a)(i), and this appeal is timely pursuant to MCR 7.204(A)(1)(a). Therefore, this court has jurisdiction pursuant to MCR 7.203(A)(1).

STATEMENT OF QUESTIONS PRESENTED

1. The Michigan Employment Relations Commission (MERC) has exclusive jurisdiction over a limited subset of labor matters which are categorized as unfair labor practices. Appellants brought an action in the circuit court based predominantly of contract formation, statutory interpretation, and the constitutional limits placed on the authority of a public body. The Third Circuit Court dismissed this case and held that MERC had exclusive jurisdiction because the case included a violation of Michigan's Public Employment Relations Act (PERA) that was not an unfair labor practice. Was the matter improperly dismissed when the exclusive jurisdiction of the MERC is limited to hearing unfair labor practice charges, and does not include jurisdiction over the matters at issue in Appellants' action?

Appellants say:	Yes.
Appellees say:	No.
The Third Circuit Court says:	No.

2. Michigan's Public Employment Relations Act (PERA) governs public sector labor relations. PERA contains multiple provisions which dictate that there is one collective bargaining agreement with one expiration date, and these provisions are rendered meaningless or unworkable if there are multiple collective bargaining agreements with different expiration dates. Does the Appellees' attempt to enter into two separate and distinct collective bargaining agreements with different expiration dates violate PERA?

Appellants say:	Yes.
Appellees say:	No.
The Third Circuit Court says:	Did not reach this issue.

3. A valid contract requires that certain elements be met at the formation. A labor contract is not exempt from these formative elements with the exception of certain aspects of offer and acceptance. Is the labor contract at issue here invalid where it lacked the necessary element of consideration?

Appellants say:	Yes.
Appellees say:	No.
The Third Circuit Court says:	Did not reach this issue.

4. A legislative body may not pass a law which diminishes or restricts the power of a future sitting of the legislative body to change the course of their public policy, and the use of a contract to overcome this prohibition is discouraged. The appellee school board has attempted to use an invalid contract to restrict subsequent school boards from changing its policy which affects hiring, firing, and employee retention. Is the school board's attempt to restrict subsequent school boards invalid because it exceeds its authority?

Appellants say:	Yes.
Appellees say:	No.
The Third Circuit Court says:	Did not reach this issue.

5. Is an employee, who is covered by a collective bargaining agreement contract which lists specific duties and responsibilities owed to him or her, a third-party beneficiary such that they have standing to bring an action on the contract?

Appellants say:	Yes.
Appellees say:	No.
The Third Circuit Court says:	Did not reach this issue.

I. STATEMENT OF FACTS AND BACKGROUND

The relevant facts of this matter are straightforward and uncontested, but are likely unprecedented. For the first time this court will be faced with a matter where a union security clause was made as a standalone collective bargaining agreement separate and distinct from the collective bargaining agreement containing the wages and conditions of employment. The Appellants (the "Teachers") are public school teachers employed by the appellee Taylor School District (the "School District"), which is governed by the appellee Taylor Public School Board of Education (the "School Board"). The Teachers, as employees, are represented by a labor union bargaining representative, the appellee Taylor Federation of Teachers, AFT 1085 (the "Union"). (Collectively, the School Board, School District and Union are referred to as "Appellees.") On or about February 6, 2013, the School Board and the Union entered into a union security agreement (the "Union Security Agreement"). A copy of the Union Security Agreement is attached as Exhibit A. The Appellees characterized this Union Security Agreement as a "separate," second "collective bargaining agreement." *Id*. at page 3, section 2. A union security agreement typically compels the represented employee to pay either dues or agency fees to the union, and requires the employer to fire the employee at the union's request if the employee does not pay these dues or fees. Such a termination provision is present here. *Id*. at section 1(b)(v). Union security agreements are usually a clause within a single, general mandatory collective bargaining agreement entered into by the employer and the union; and the security clause is effective for the same length of time as the collective bargaining agreement of which it is a part.

In this matter, however, the Appellees' 10-year Union Security Agreement was separate from their four-year collective bargaining agreement (the "CBA"). A copy of the CBA is attached as Exhibit B. The CBA was ratified and became effective immediately prior to the

Union Security Agreement. A copy of the ratification agenda is attached as Exhibit C. Questions 1 and 2 of Exhibit C show the timing of the two ratification votes. The separation of the Union Security Agreement from the CBA and the differing expiration dates are unusual and might be unprecedented.

The only consideration offered by the Appellees to support the Union Security Agreement was "labor peace and bargaining unit continuity which both parties acknowledge to be valuable to each of them." See Exhibit A, introductory paragraph.

The Union sought a union security agreement separate from the CBA because Michigan's new "Freedom To Work" law (also known as "Right To Work"), 2012 PA 349, bans such security agreements and outlaws any legal requirement that an employee pay union dues or fees as a condition of employment. The new Freedom To Work law took effect March 28, 2013, and it could not void contracts already in existence without a potential breach of the 'contracts clauses' of both the Michigan and United States constitutions. As a result, a contract, such as the Union Security Agreement in the instant case, entered into or extended before the effective date of the new law would be valid if the contract or extension were legal.

The Teachers filed suit on February 28, 2013, challenging the validity of the Union Security Agreement. The Teachers stated that, as third-party beneficiaries to the Union Security Agreement, they had standing to seek a declaratory judgment as to its validity. The Teachers contended the Union Security Agreement is invalid for three reasons. First, Michigan's Public Employment Relations Act (PERA) contains several provisions which are made unworkable if there are multiple simultaneous collective bargaining agreements with different expiration dates; therefore, such an arrangement violates PERA. A contract that violates public policy is unenforceable and void *ab initio*. See *Shapiro v Steinberg*, 176 Mich App 683, 687; 440 NW2d

9 (1989). Second, the Union Security Agreement was a contract made without valid consideration, and as such is void. See *Staszak v Romanik*, 690 F2d 578, 584 (CA6 1982). Third, the School Board used a contract of unreasonable length to set a public policy which would constrain the decision making authority of successor school boards. Using a contract to set an unalterable public policy exceeds the authority of a legislative body, and the School Board's action which exceeded its authority was *ultra vires*, therefore void *ab initio*. See, *McKane v City of Lansing*, 244 Mich App 462, 464; 625 NW2d 796 (2001).

The Teachers and Appellees made cross motions for summary disposition. The Appellees' summary disposition motion[1] argued that the circuit court lacked jurisdiction because "the Michigan Employment Relations Commission has exclusive jurisdiction with regard to enforcement of the Public Employment Relations Act MCL 423.201 et seq…" (Defendants' Summary Disposition Brief at 1.) The Teachers argued that the MERC's exclusive jurisdiction is only over unfair labor practices and that this matter involved contract formation, statutory construction, and the constitutional limitations which restrict the actions of a legislative body – all of which are matters within the general subject matter jurisdiction of the circuit courts.

On July 9, 2013, the circuit court heard oral arguments on the matter and agreed with the Appellees, ruling that "The Public Employment Relations Act, PERA, governs labor relations in public employment, and this is obviously a public employment situation involving Taylor Public Schools, teachers of the Taylor Federation of Teachers, AFT Local 1085, the Taylor Public School Board of education, so clearly this is a situation that has to do with labor relations and public employment. …it is a matter for the Michigan Employment Relations Commission which

[1] The Appellees brought their summary judgment motion as a challenge based on *personal* jurisdiction under MCR 2.116(C)(1), although it was argued and the court treated it as a motion challenging subject matter jurisdiction under MCR 2.116(C)(4).

has exclusive jurisdiction with respect to violations of PERA that should make the determination and not this Court. The Defendants' Motion for Summary Disposition is granted." (Hearing Transcript at 36-37.) The resulting Order which is appealed from here was issued July 24, 2013, and stated that the dismissal was made "for the reasons expressed from the bench following argument on July 9, 2013..."[2]

II. STANDARD OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278, 831 NW2d 204 (2013).

III. ARGUMENT

A. The Teachers' action, although it involved a public-sector labor union and employer, was one whose result depended on interpretations of statutory construction, contract formation, and the constitutional powers of a legislative body.

Not every action involving a public-sector labor union and/or employer is properly characterized as an unfair labor practice. Before examining the limitations of the MERC's jurisdiction, and why this action does not properly belong there, the Teachers will describe the causes of action which were brought in the circuit court.

1. Two simultaneous collective bargaining agreements with differing expiration dates violates PERA.

[2] After the Teachers circuit court action was dismissed for lack of subject matter jurisdiction, they brought unfair labor practice charges against these same Appellees in the MERC. These are Docket No. 13-007942-MERC, Case No. C13 G-133 (charging the employer), and Docket No. 13-007944-MERC, case No. CU13 G-029 (charging the union). The unfair labor practice charges arose from the same facts as the matter here. A hearing was held on these matters on November 8, 2013, and a Decision and Recommended Order of Administrative Law Judge on Motions for Summary Disposition was issued on December 27, 2013. The ALJ recommended the dismissal the Teachers' unfair labor charges. At this time the Teachers' exceptions have not yet been filed and the commission has not adopted or rejected the ALJ's recommendations.

The Union Security Agreement, by virtue of being a second collective bargaining agreement with a different expiration date than the first CBA, violates PERA.[3] Such an arrangement makes certain PERA statutes meaningless. PERA cannot be interpreted in such a manner to make portions meaningless; therefore an attempt to make a second collective bargaining agreement with a different expiration date is void against public policy. Contracts that are void against public policy are void *ab initio* and have no effect. *Shapiro*, supra.

The recently enacted MCL 423.215b,[4] being Section 15b of PERA, prohibits wage increases after the expiration of a collective bargaining agreement. This Section is made meaningless by multiple collective bargaining agreements. The statute states:

> (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. …
>
> ***
>
> (4)(a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

Multiple collective bargaining agreements make MCL 423.215b unworkable where these agreements have overlapping expiration dates. The plain reading of the statute says that wages are frozen at current levels on "the expiration date set forth in a collective bargaining agreement." This statute makes no sense if there could be a hypothetical collective bargaining agreement which was separate from the collective bargaining agreement covering wages, like the

[3] While the courts have not ruled that there cannot be two collective bargaining agreements with different expiration dates in effect at the same time, no such arrangement has been challenged for the reason that it does not appear that such an arrangement has been tried.

[4] This provision became effective on June 8, 2011.

Union Security Agreement here, but which expired on an earlier date than the collective bargaining agreement covering wages. Under the plain words of the statute, the expiration of *any* collective bargaining agreement would freeze wages. This could not have been what the Legislature intended.

MCL 423.214, being Section 14 of PERA, is known as the three-year "contract bar" statute, which protects a certified union from competition from other unions for three years after a collective bargaining agreement is entered into: "(a)…A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later." If there are multiple collective bargaining agreements with different expiration dates, these agreements can be staggered so that the three-year contract bar never expires – there could always be a collective bargaining agreement executed within the last three years. This would make the statute meaningless. If two different collective bargaining agreements are allowable, then what would prohibit three, four, or more collective bargaining agreements from being used so that there is always a collective bargaining agreement in place that would prevent another union from coming in and taking over representation of a unit? The statute becomes meaningless if multiple collective bargaining agreements are permitted at the same time.

The three-year contract bar in PERA was likely modeled on the three-year contract bar developed by the National Labor Relations Board. The NLRB set the bar administratively at three years in *General Cable and United Electrical*, 139 NLRB 1123, 1125 (1962) and, in that opinion, discussed the public policy reasoning behind the three-year contract bar. Notably, this

includes the need of employees to retain the right to eradicate discontent within their own union and choose another representative:

> Compositely, all these factors serve to stress the efficacy of collective agreements, the need to respect their provisions, the desirability of discouraging raids among unions, **the wisdom of granting relief to employees to assist them in eradicating major causes of discontent arising within their own institutions and from [the institution's] relations with [the institution's] employees,** and the imperative for long-range planning responsive to the public interest and free from any unnecessary threat of disruption. The accommodation we have made in balancing **the interest of employee freedom to choose representatives**, and the interest of stability of industrial relations, is in the perspective of these conditions and events.

Id. at 1126 (emphasis added). The contract bar was meant to coincide with the collective bargaining agreement, and the NLRB has stated that three years was a "reasonable" length of time: "The purpose of the [three-year] contract-bar rule is 'to promote industrial peace by stabilizing, for a reasonable term, a contractual relationship between employer and union.'" *Id.* at 1261. Binding the employees to a particular union through a collective bargaining agreement or union security agreement of more than three years runs afoul of the public policy goal of "granting relief to employees to assist them in eradicating major causes of discontent arising within their own institutions and from [the institution's] relations with [the institution's] employees. . . ." *Id.* at 1126.

Moreover, if the intended public policy of the NLRA and PERA is to allow employees their "freedom to choose representatives," *Id*. at 1126, then surely the public policy was meant to protect the employees' right to choose not to pay for representation they do not want. Where, as in Michigan, we no longer require an employee to pay the union anything, the denial of this freedom for 10 years runs counter to the stated public policy balance of using three years as the longest period employees must forgo choosing a change in their representative.

The three-year contract bar is considered a reasonable degree of protection for a labor union, and would be a logical maximum length for any security agreement as well. To say that there is no logical maximum length for a union security agreement is the same as saying that a perpetual union security agreement would be valid. If 10 years is allowable for a union security agreement, would 20 years be permissible? A hundred? The logical consequence of the Appellees' position is that a public employer and a union could theoretically enter into a perpetual union security agreement which would deny the Charging Parties their rights under Freedom to Work forever. Collective bargaining agreements must have some limitation on them, particularly when they dictate the outcome of a public policy and deny employees their rights. Although three years would seem to be a reasonable maximum length, if the court wants to avoid drawing a firm line, it could hold that - wherever that line may be - 10 years is too long.

Having multiple collective bargaining agreements makes sections of PERA meaningless and nullifies the public policies that PERA was meant to enact. "The Court must avoid construing a statute in a manner that renders statutory language nugatory or surplusage." *People v Ball*, 297 Mich App 121, 123 (2012). Furthermore, "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Robinson v Lansing*, 486 Mich 1, 8 n. 4 (2010). Reading MCL 423.214 and MCL 423.215b *in pari materia* is especially appropriate where, as here, the two statutes are so close in sequence within the same act. In this case, the system is clear: There is to be one controlling collective bargaining agreement with one expiration date which governs the terms and conditions of employment.

2. A collective bargaining agreement is a contract and, like any other contract, it requires valid consideration. The Union Security Agreement here lacks valid consideration.

It is fundamental that a valid contract requires that consideration be given. "An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). It is likewise black-letter law that a pre-existing obligation cannot serve as the consideration for a new contract, and that a new contract or a revision of the existing contract requires new consideration:

> Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise. This rule bars the modification of an existing contractual relationship when the purported consideration for the modification consists of the performance or promise to perform that which one party was already required to do under the terms of the existing agreement.

Yerkovitch, 740-41 (citations omitted). Although the mandatory nature of collective bargaining precludes many of the common-law rules of contract formation, the consideration requirement is not forgone. Michigan's courts have evaluated consideration in the context of labor agreements. *Michigan Association of Governmental Employees (MAGE) v Michigan*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2013, Docket No. 304920 (a copy of which is attached as Exhibit D to Plaintiff's Supplemental Brief dated July 2.) In *MAGE*, the subject matter was a labor contract in the context of the Civil Service, not PERA, and the question of the necessity of consideration arose. Although not specifically about consideration, *MAGE* court looked for consideration and found it, thus upholding the contract's validity:

> Defendants also argue that plaintiff did not provide any valuable consideration to defendants. **An enforceable contract requires legal consideration be given by each party.** [] Here, plaintiff promised to recommend the indicated compensation increases to the coordinated compensation panel for fiscal years 2009, 2010, and 2011. By agreeing to recommend those amounts, plaintiff surrendered the opportunity to lobby for larger compensation increases for its members. Furthermore, defendants do not dispute plaintiff's assertion that it agreed to fringe benefit concessions. **This constitutes valuable consideration.**

Id. at *4 (emphasis added).

Similarly, the National Labor Relations Board has looked for the existence of consideration:[5]

> . . . in defining the rights and obligations of the parties with respect to the formation of a collective-bargaining agreement, the [NLRB] has traditionally adopted many of the general, if not highly technical, elements of the common law of contracts. . . . And the Board may even look to some of the more technical aspects to bolster its analysis of a dispute. **Relevant to the instant case is the principle, key to the formation of an enforceable contract, that a party must have made commitments in the context of a bargained-for exchange of consideration.**

Sacramento Union, 296 NLRB 477, 482 n. 12 (1989) (internal citations omitted, emphasis added).

In the matter here, since the Union Security Agreement is unambiguous, the courts do not look beyond the explicit language of the document. See, generally, *Shay v Aldrich*, 487 Mich 648, 667 (2010). The only "consideration" described in the Union Security Agreement was "labor peace and bargaining unit continuity which both parties acknowledge to be valuable to each of them." This claimed consideration is invalid for the reasons that follow.

Consider "labor peace." Given the prior ratification of the CBA, "labor peace" cannot serve as consideration for the Union Security Agreement. After all, the reaching of "labor peace" or "industrial peace" is the reason that mandatory collective bargaining is authorized by PERA, MCL 423.201, *et seq*., in the first place. The MERC has stated: "[T]he primary objective of PERA is the prompt effectuation of labor peace, achieved through the existence of a mutually

[5] Michigan's courts will often look to the federal National Labor Relations Act (NLRA) and the interpretation of the NLRA by the federal courts and the National Labor Relations Board (NLRB) whenever, as here, PERA and the NLRA are analogous or not otherwise in conflict. See, for example, *AFSCME v Highland Park School Dist*, 457 Mich 74, 96 n. 2; 577 NW2d 79, (1998) (citations omitted): ". . .the instant case is governed by the public employee relations act. It is true that the PERA is patterned after the federal National Labor Relations Act. Moreover, in 'construing our state labor statutes we look for guidance to "the construction placed on the analogous provides of the NLRA by the [National Labor Relations Board] and the Federal Courts.'"

accepted collective bargaining agreement." *Waterford School Dist and Waterford Educ Ass'n*, 23 MPER ¶ 91 (Oct 22, 2010). The courts have likewise determined that achieving labor peace is the reason for requiring collective bargaining. "A prime purpose of the Act is to foster industrial peace through collective bargaining." *Modern Plastics Corp v NLRB*, 379 F2d 201, 204 (CA6 1967). Hence, every collective bargaining agreement authorized by the National Labor Relations Act must provide labor peace as that is its defining characteristic: "It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks Inter Ass'n Local Unions Nos 128 and 633 v Lion Dry Goods*, 369 US 17, 28; 82 SCt 541 (1962). The provision of labor peace is therefore a necessary part of every collective bargaining agreement, whether or not the provision of labor peace is explicitly listed as consideration. Therefore, the duty of labor peace was already given as consideration for the CBA, and the effectuation of labor peace was a pre-existing duty that could not be used as consideration for the subsequent Union Security Agreement.

Nor could either Appellee offer "bargaining unit continuity" as consideration. Michigan statutes grant a public-sector union only three years of guaranteed representation — the three-year "contract bar" that was discussed previously. For the School District acting through its school board, it is probably the case that the attempted "bargaining continuity" consideration was not meant to have been given by the School District, but only by the Union. Indeed, it is difficult to imagine what bargaining continuity the school board could give since it is an elected body subject to replacement by the voters. If they mean that, once voted out of office, the school board that voted for this Union Security Agreement could supersede future school boards in bargaining, this is not permitted. The school board is a legislative body that cannot bind

successor boards – which is discussed at length in a subsequent section of this brief. Therefore neither Appellee could give the bargaining continuity as promised.

Consideration that a promisor cannot provide is not valid. In *Barbat v M E Arden Co*, 74 Mich App 540; 254 NW2d 779 (1977), an agent sought to make his representation of a client consideration for their contract. Because he was unable to represent the client as promised, however, the court concluded that, "to the extent that it promised a performance to the purchaser, that promise was void as illegal. An unenforceable promise cannot constitute consideration." *Id*. at 543-44. A contract given without consideration is excused from performance and cannot bind the parties. It is therefore void as a matter of law:

> . . . Michigan recognizes the rule that failure of consideration by one contracting party justifies the other party to the contract in refusing to perform his obligations. . . . *Jinkner v Town & Country Lanes, Inc*, 10 Mich App 596 (1968), applied the rule to an ordinary commercial contract. *Nogaj v Nogaj*, 352 Mich 223, 228 (1958), dealt with a condition subsequent in a deed between a husband and wife. *Perkins v Brown*, 115 Mich 41 (1897), *Folkerts v Marysville Land Co*, 236 Mich 294 (1926), and *Palmer v Fox*, 274 Mich 252 (1936), fall into the same category. They demonstrate that Michigan follows the general rule that failure of consideration provides a legal excuse for non-performance of a contract.

Staszak v Romanik, 690 F2d 578, 584 (CA6 1982). A pre-existing duty cannot serve as consideration because it has already been given, and consideration has to be something new that is within the promisor's power to give. Both of these elements are missing from the Union Security Agreement.

In the circuit court, the Appellees argued that consideration is not necessary because the courts don't inquire into the adequacy of consideration. This is a misstatement of the law, however. The courts don't usually look to the adequacy of consideration to find if there is equivalence between what the two parties have provided; but the courts do look to ensure that some consideration has been given. Put another way, the courts don't investigate into whether

consideration X < consideration Y, or X > Y, or even that X = Y; but the courts do look to whether or not X > 0 or Y > 0. This point was made by our Supreme Court:

> It is an elementary and oft quoted principle that the law will not inquire into the adequacy of consideration **so long as the consideration is otherwise valid** to support a promise. By this is meant that **so long as the requirement of a bargained-for benefit or detriment is satisfied**, **the fact that the relative value or worth of the exchange is unequal is irrelevant so that anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised.** The rule is almost as old as the doctrine of consideration itself. [3 Williston, Contracts (4th ed), § 7:21, at 383-386.]

General Motors Corp v Dep't of Treasury, 466 Mich 231, 241 n 13; 644 NW2d 734 (2002) (emphasis added).

In the matter here, nothing was given "which fulfills the requirement of consideration."

3. The School Board exceeded its authority as a legislative body when it bound subsequent boards to a policy with a contract. Its action is therefore *ulta vires* and void *ab initio*.

The appellee School District, acting through the school board, exceeded its authority when it entered into the Union Security Agreement. Although public bodies may enter into contracts – even long term contracts – they may not use a contract to set public policy which their successors cannot change. Because the employer exceeded its authority in making such an agreement, again, the Union Security Agreement is invalid and void *ab intio*.

Begin with the fact that in general, a state legislature cannot bind a future state legislature to a policy that the subsequent body cannot change at its discretion:

> Of primary importance to the viability of our republican system of government is the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation. Therefore, a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature.

Studier v Mich Pub Sch Employees' Retirement Bd, 472 Mich 642, 655–56; 698 NW2d 350 (2005).

The School District derives its authority from the state Legislature and is, according to its bylaws, a "general powers school District." A copy of this relevant bylaw is attached as Exhibit E, "Board Bylaws Effective August 24, 2009, 1010 District Legal Status." As a "general powers school district it is endowed with certain powers by the state legislature." See, generally, the Revised School Code, MCL 380.1 *et seq*. Further, the School District itself is a legislative body. The School District acknowledges this legislative function in its Bylaws: "The Board will function as a legislative body in formulating and adopting policy, by selecting an executive officer to implement policy and by evaluating the results." See Exhibit F, "Board Bylaws Effective August 24, 2009, 1001 Introduction and Information."

The Legislature cannot grant to the School District (or any other legislative body or executive agency) powers beyond the Legislature's own. If the Legislature cannot bind subsequent Legislatures, a school board cannot bind subsequent school boards. That this important constraint of the law has been applied to municipal legislative bodies as well as the state Legislature cannot be questioned. "From the very nature of the powers conferred upon the Board of Supervisors by the Constitution and laws of the State, the Board of Supervisors of Wayne County of 1931 was without power or authority by ordinance or otherwise to in any way limit the power of subsequent Boards of Supervisors to exercise their constitutional or legislative power...." *Atlas v Wayne Co*, 281 Mich 596, 599; 275 NW 507 (1937).

Of course, legislative bodies such as the School District do have the power to enter into contracts that may bind subsequent legislative bodies to a certain action. To protect against the abuse of using a contract to do what a statute cannot, however, the courts have set a high

standard for ensuring that it is truly a valid contract and not just an end-run around the fundamental prohibition on making unalterable policy. Notably, Justice Cooley set forth the standard, writing for a unanimous court:

> Legislators cannot thus bind the hands of their successors where the elements of contract, concession and **consideration** do not appear; and the doctrine that it may do so by contract is one so exceptional, and so liable to abuses, that courts will not be astute in discovering the existence of a contract between the state and those who claim franchises under it, where the essential elements of a contract are not manifest.

City of Detroit v Detroit & Howell Plank-Road Co, 43 Mich 140, 145; 5 NW 275 (1880) (emphasis added). [6] As we have seen in the discussion of consideration, this element was wholly lacking here.

The 10-year Union Security Agreement entered into by the School District serves no other purpose then to set public policy. It would suspend the state's Freedom to Work Act in the Taylor School district for over a decade. It forces subsequent school boards to fire teachers upon the demand of the union, even if future school boards see this as a bad policy. It forces subsequent school boards to demand payment of union dues or fees, currently set at approximately $800 a year, from the teachers in the district, even if this depresses teacher

[6] The Appellees may object that the holding in *Detroit & Howell Plank-Road* is obsolete based on its age. This objection is not telling. *Detroit & Howell Plank-Road* has not been overruled by our Supreme Court; it remains controlling law. See, *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009) (internal citations omitted):

> . . .this Court remains bound by our Supreme Court's decision . . . until such time as our Supreme Court instructs otherwise: "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." . . . "The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete."

recruiting and retention in an environment in which teachers in many competing school districts will not face a similar punitive demand. Where, as here, the "essential elements of contract [namely, consideration] are not manifest," and where the Union Security Agreement is solely for the purpose of setting an unalterable policy, the School Board "cannot thus bind the hands of their successors." *Detroit & Howell Plank-Road Co.*, 43 Mich at 145.

In the trial court the Appellees did not address the law that states that a legislative body may not bind subsequent legislative bodies to a certain policy through a spurious contract. Rather, they attacked a straw man by saying, "[The Teachers] premise their argument on the specious proposition that a legislative entity may not bind another sitting of that entity through the making of contracts. The concept itself is bizarre." Defendants' Response Brief at 13-14. The Teachers never made any such claim. Rather, the Teachers have shown how the law disfavors using a contract to set a public policy that a subsequent legislative body cannot alter. Hence, when legislative bodies sign contracts, those documents are subject to exacting scrutiny to ensure that these are truly contracts for goods or services and not just a means of unconstitutionally setting a binding policy. Indeed, the Appellees' citation of *Studier v Michigan Public School Employees Retirement Board*, *supra*, only proves the Teachers' point. The opinion in *Studier* states that "such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Studier* at 660-61. It is because of this strong disfavor for contracts restricting legislation that "[a] necessary corollary of these limitations that has been developed by the United State Supreme Court, and followed by this court, is the strong presumption that statutes do not create contracts." *Id* at 661. Why would there be such a strong presumption against statutes creating contracts if contracts, as here, could substitute for statutes and set public policy?

The Teachers do not contend that school districts cannot enter into contracts of long-term duration; these can be valid, and they occur all the time. But all such contracts will be scrutinized for the key elements, such as consideration, that a real contract for goods and services contains, and the agreements will be set aside if these elements are lacking.[7] The president of appellee Union has been publicly forthright about using this Union Security Agreement to set policy in response to the Freedom to Work Act.[8] The Union Security Agreement here lacks consideration and was entered for the sole purpose of setting an unalterable public policy. As such it exceeds the authority of the School District, is *ultra vires* and is therefore void *ab intio*. *McKane*, supra.

The unique facts here can act as a limiting principle. The bifurcation of the Union Security Agreement from the rest of the CBA, the 10-year length of the Union Security Agreement, and the candid admission by the Appellee union's president that this was an intentional attempt to circumvent legislation should allow other school districts to enter multi-

[7] Defendants' Response Brief, at 14, cited *In re Request for Advisory Opinion Enrolled Senate Bill 558 (Being 1976 PA 240)*, 400 Mich 175; 254 NW2d 544 (1977), for the proposition that a legislature can enter into hypothetical long-term contracts. *In re Request* is inapplicable here as it was applied to a hypothetical situation with no actual contract in evidence. *Id.*, Concurrence, at 322. Unlike the situation at hand, there were no contractual terms to scrutinize: "We do not have before us the leases . . . or contracts particularizing the arrangements between the parties. . . . *Id.*, Dissent at 324-25. That does not mean that such scrutiny of an actual contract does not take place.

[8] See, The Washington Examiner, May 7, 2013, "Sean Higgins: Michigan teacher unions want long-term right to rule public schools." http://washingtonexaminer.com/sean-higgins-michigan-teacher-unions-want-long-term-right-to-rule-public-schools/article/2529079. The article states: "The most controversial example involves Taylor Federation of Teachers Local 1085. The union represents Taylor, a city just south of Detroit. It negotiated a five-year contract that also includes a 10-year security clause.

Local 1085 President Linda Moore was quite matter of fact when I called and asked her about it.

'Knowing that we were heading into right to work, we negotiated the union security clause as well,' Moore said. It was 'absolutely' a reaction to the state passing a right-to-work law, she told me.

She added that the union's security clause typically was 'for the length of the (contract) agreement.'"

year contracts (with unions or other parties) without risk while still allowing this convoluted attempt by Appellees to thwart the Freedom to Work law to be declared illegal.

4. An employee who is covered by a collective bargaining agreement is an interested party and has standing to request a ruling on the validity of the collective bargaining agreement.

The Teachers, as intended beneficiaries of a contract, are parties to the contract and therefore they have standing to challenge the contract made on their behalf: "[A] party having the status of a third-party beneficiary to a contract has the same right to enforce that contract as the promisee." *Stillman v Goldfarb*, 172 Mich App 231; 431 NW2d 247 (1988). This right is given by statute:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> > (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

MCL 600.1405. The statute goes on to describe the right of a member of a group, such as a bargaining unit, who is unascertainable at the time the contract was made, to enforce the contract:

> If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

MCL 600.1405(2)(b). MCL 600.1405 has been applied to intended beneficiaries of collective bargaining agreements. See, *Menosky v City of Flint*, 2012 WL 5818330 (ED Mich) (attached as Ex. G) wherein the court considered whether the plaintiffs, who were married to employees who were covered by the subject CBAs, had third-party standing to enforce the receipt of benefits

under the CBAs. The court held that the *Menosky* plaintiffs did have third-party standing to enforce the CBA under MCL 600.1405: ". . . Plaintiffs' claim of breach of contract under a third-party beneficiary theory is sufficiently pleaded. . . ." *Id.*

The Appellees, at the trial court, alleged that the Teachers lacked standing to seek a ruling on the Union Security Agreement despite Michigan's third-party beneficiary statute, MCL 600.1405. To support their argument, Appellees relied on three threads of case law. First, Appellees made use of an unreported, inapplicable, and undermined Michigan case involving an interpretation of a Civil Service Commission Rule: *Wise v Civil Service Commission*, unpublished opinion per curiam of the Court of Appeals, decided Aug 23, 2007, (Docket No 268275).[9] Defendants' Summary Disposition Brief at 7. Second, Appellees offered cases which were factually distinguishable from the instant case as they dealt with parties who were not intended beneficiaries of the subject contracts: *First Security Savings Bank v Aitken*, 226 Mich App 291; 573 NW2d 307 (1997) and *Dohko v Jablonowski*, unpublished opinion per curiam of the Court of Appeals, decided Nov. 15, 2012, (Docket No 306082).[10] Defendants' Summary Disposition Brief at 7-8. Lastly, Appellees relied on a series of federal rulings that are not applicable because these were all based on the specific structure of the federal Labor Management Relations Act (LMRA), 29 USC 185, or deal with arbitration. Defendants' Summary Disposition Brief at 8-9. The LMRA is jurisdictional in nature and the statute explicitly does not include employees, such as the Teachers, in its coverage.

Turning to the first of the Appellees' arguments regarding the Teachers' standing, the opinion in *Wise, supra,* specifically indicates that its holding is confined to the Michigan Civil Service Commission's (CSC) applying a rule it promulgated. The CSC has very specific plenary rule-making

[9] This case can also be found at 2007 WL 2404523.
[10] This case can also be found at 2012 WL 5853754.

authority under the Michigan Constitution of 1963, which insulates the CSC from legislative statutes that govern collective bargaining agreements in other sectors of government employment:

> [The Michigan Civil Service Commission] 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 (2002)]. [It] "is vested with plenary and absolute authority to regulate the terms and conditions of employment in the civil service." *Id*. Consistent with [the commission'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).

Wise, 2007 WL 2404523 at *2. The petitioner in *Wise* brought an action in the CSC. She sought to take advantage of Civil Service Rule 6-3.5(a), which permits "[a]ny person" to "file a complaint with the state personnel director that 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." She then sought to use Rule 6-3.5(c) to appeal the decision of the state personnel director. The CSC turned down her petition and held, based on its own interpretation of its own rule, that the right to appeal granted to "any person" under Rule 6-3.5(c) applied only to the union and the employer. *Id*.

Wise does not apply to a situation outside of the Civil Service Commission and its specific rules. However, even if *Wise* were a published opinion, and even if it were not specific to the CSC, it would not be controlling in the instant case. The Michigan Supreme Court has overruled the standard used in *Wise* with its holding in *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008). In *Wise*, the employee appealed the administrative decision to the circuit court, which held that the CSC was incorrect in its interpretation and that an employee *did* have standing under the collective bargaining agreement:

> 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).

Wise, 2007 WL 2404523 at *2. The appellate court reversed. It held that a court must give deference to an agency's legal rulings. *Id*. at *3, citing *Adrian School District v Michigan Public School Employees' Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998).

But *Wise* and *Adrian Schools* (which served as the premise for *Wise*) are based on a now-overruled degree of judicial deference to agency decisions — a deference that was discarded only in the face of a "substantial and material error of law." *Adrian Schools*, 458 at 332. This standard of deference has been overruled in its application to agency decisions by *In re Complaint of Rovas, supra*. Instead, the *Rovas* opinion held that agency determinations, such as the Michigan Public School Employees Retirement Board in *Adrian Schools*, are entitled to respectful consideration, but are not binding on the courts:

> ". . . [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. . . . **However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.**"

Rovas, 482 Mich at 103 (emphasis added). *Rovas* even singled out *Adrian Schools* as using an improper standard. *Id*. at 105. In short, because *Wise* relied on a standard from *Adrian Schools* that the Supreme Court, in *Rovas*, has overruled, *Wise* is hardly a reasonable guide regarding deference due to agency decisions. Courts look to the clear language of a statute, such as MCL 600.1405 (the third-party beneficiary statute). Only where there is no clear language, then an agency's interpretation of ambiguities would be given respectful consideration.

Turning to the Appellees' second major claim regarding standing, they contend *Aitken*, *supra*, and *Dokho*, *supra*, show that "non parties may not challenge the validity of a contract or assert that the contract has been breached." Defendants' Summary Disposition Brief at 7. These decisions are irrelevant. The Teachers are not "non-parties"; they are third-party beneficiaries with statutory standing under MCL 600.1405.

The cases *Aitken* and *Dohko* are easily distinguishable from the matter at issue here, as the parties in those two cases are clearly not intended beneficiaries. In *Aitken*, the parties claiming third-party beneficiary status were real estate developers who had defaulted on a construction loan. However, the plaintiffs were not suing regarding their own construction loan; rather, they claimed that they were the intended beneficiaries of additional loans that the lender was originally to have made to other borrowers, and that these loans would have financed further construction. When these additional construction loans never materialized, the plaintiffs claimed not only that this failure was a breach of contract, but also that they had the ability to sue for the enforcement of the contracts (that had never been made) because they would have benefited from the additional loans (to which they were not a party). *Id* at 294. In its ruling, the *Aitken* court read MCL 600.1405 to limit third-party beneficiary status to those who would benefit from the parties' acting or refraining from acting:

> Generally, one who is not a party to an agreement cannot pursue a claim for breach of the agreement. The [plaintiffs] claim that they have standing to assert a breach of contract claim against [the lender] because they are third-party beneficiaries of an agreement between [the lender] and [the development]. To establish standing as third-party beneficiaries and to assert a breach of contract claim against [the lender], the [plaintiffs] must prove that [the lender] made a promise to [the development] to do or refrain from doing an act **directly** for the [plaintiffs] benefit.

Id at 305 (citation omitted)(emphasis added).

The ruling in *Aitken* does not preclude Plaintiffs' right to challenge the contract in the instant case. Plaintiffs, as employees, are specifically identified in the Union Security Agreement at issue — completely unlike *Aitken*. Moreover, the Union and School Board (employer) are both required to act or refrain from acting directly to or for employee Teachers (emphasis added). The contract is replete with examples of both the promisors' and Teachers' duties:

> **[T]he Union's duties to persons employed in the bargaining unit require** that each unit member share the costs associated with the negotiation and administration of this collective bargaining agreement. Therefore, **each person employed in the bargaining unit shall either become a member** of the Taylor Federation of Teachers and pay dues required of members or agree to pay a service fee **. . . A service fee will be deducted [by the Defendant School Board] from the paychecks of persons who fail or refuse** to do either.
> . . .
> . . . **The employer will deduct dues or service fees from the paychecks of persons who have agreed to such deductions or who have not responded** to a request for election…
> . . .
> **The Employer will forthwith notify the individual employee that he or she is subject to discharge for the failure or refusal to either join the Union or to pay or arrange for payment of a service fee**.
> . . .
> **The Union will notify the Employer of the name(s) of any individual employee who has failed either join [sic] the Union or to pay**…"
> . . .
> . . .[**T]he Employer shall discharge the individual employee(s) from employment and shall not reemploy the individual as an employee. . . .**

Union Security Agreement, attached as Exhibit A. The subject Union Security Agreement is replete with things which the promisors, the Union and the School Board, have agreed that they will do to or for, or refrain from doing to or for, teachers who are members of the bargaining unit. To rephrase MCL 600.1405 using the parties in this action: "A promise shall be construed to have been made for the benefit of a [Teacher] whenever the [Union or the School Board] has undertaken to give or to do or refrain from doing something directly to or for said [Teacher]." The Teachers have clear duties under the Union Security Agreement and face clear consequences

if they do not meet those duties. The promisors, the Union and the School Board, likewise have clear duties to do and refrain from doing certain acts to the employee Teachers who are named throughout the Union Security Agreement as the intended beneficiaries.

Appellees' second case, the unreported *Dokho*, *supra*, likewise contains a fact pattern that clearly shows that the plaintiff was not an intended beneficiary. In *Dokho*, the son of a homeowner tried to claim that he was the intended beneficiary of a homeowner's insurance policy held by his deceased mother. The policy in question clearly stated that the mother was the only "named insured." *Dokho*, 2012 WL 5853754 at *1. Furthermore, the policy provided clear instructions for the transfer of the policy to another person after the death of the policy holder if consent was given by the insurer. These instructions were never complied with. *Id* at *7. The court concluded that the *Dokho* plaintiff was not a party and could not seek reformation. Like *Aitken*, *Dokho* is inapplicable in the instant matter.

In their third major argument over standing, Appellees cite to an employee's standing under a specific federal labor law. As noted above, the case cited by Appellees, *Brown v Sterling Aluminum Products Corporation*, 365 F2d 651 (CA8 1966), was brought and decided under the federal Labor Management Relations Act (LMRA). *Brown*, 365 F2d at 654. The LMRA is an act that is concerned primarily with jurisdiction and that by its specific terms provides federal district courts with jurisdiction over state law contract claims involving employers and labor unions: "Suits for violation of contracts between an **employer** and a **labor organization**…or between such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 USC 185(a) (emphasis added). Whereas a federal court's subject-matter jurisdiction over state law claims is usually limited to matters where there is

diversity between the parties and the amount in question exceeds $75,000, the LMRA expands this jurisdiction when the matter is related to labor contracts. And though jurisdiction is expanded, it is still confined to an "employer" and "a labor organization"; the statute's text does not include employees.

The LMRA is thus one of the many pathways available in matters related to disputes involving organized labor in the private sector. The parties may bring an action before the National Labor Relations Board, in state court, or before the federal district court if they meet the criteria in the LMRA. Hence, for several reasons, the LMRA has no bearing on the jurisdiction of the state courts in this matter regarding public-sector employees: first, it is a statute that confers jurisdiction on the *federal courts* to hear state law matters; second, it specifically applies to only employers and unions; and third, it applies only to the private sector. Because the LMRA does not affect the state court's jurisdiction over these contract claims, it cannot be used to deny this court the jurisdiction provided by our third-party beneficiary statute, MCL 600.1405.

The other series of labor law cases relied upon by the Appellees are likewise inapplicable for the reason that they were brought under the LMRA. These three cases, discussed below, are inapplicable for a second reason, as well: They involve an employee challenging a decision of an arbitrator. Unlike the instant case, arbitration, under the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq., is necessarily confined to issues and parties who consent to the arbitration:

> The language and holdings on which Local and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly "a matter of consent," … and thus "is a way to resolve those disputes — **but only those disputes** — that the parties have agreed to submit to arbitration."

Granite Rock Co v Int'l Brotherhood of Teamsters, 130 SCt 2847, 2857; 561 US 287 (2010)(emphasis added). Because the scope of arbitration can be so restricted, the first duty of

the court is to "decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply. . . ." *Id.* n 6. If the scope of the arbitration is limited by the parties seeking arbitration to the employer and the union, then the court's enforcement is so limited.

This restriction on arbitration's scope obviously does not apply to a court's jurisdiction. Unlike arbitration, the parties to a court action cannot agree to limit the scope of a court's jurisdiction by consent, nor can they expand jurisdiction by consent. An employer and a union cannot, for example, collude and agree that an employee does not fall under the jurisdiction of MCL 600.1405.

The three arbitration cases cited by Appellees, *Cleveland v Porca Company*, 38 F3d 289, 297 (CA7 1994), *Katir v Columbia University*, 15 F3d 23, 24-25 (CA2 1994), and *Martin v Youngstown Sheet and Tube Company*, 911 F2d 1239, 1244 (CA7 1990) all suffer from these double deficiencies: They were all brought in federal court under the LMRA, and they all involve an arbitration award where the employees were not parties to the arbitration. There is no federal law that is like MCL 600.1405 in providing intended beneficiaries with standing or providing federal courts with jurisdiction over the beneficiaries' claims under the LMRA or federal arbitration law. Therefore, the cases cited by Appellees are not applicable to the matter here.

Given that the Teachers are intended beneficiaries, they are therefore interested parties that have standing to seek a declaratory judgment regarding the power of the Union Security Agreement to bind them. Michigan's Rules of Court provide that the circuit courts may issue a declaration to determine the rights and duties of parties. Without authority, Appellees have contended that third-party beneficiaries cannot seek a declaratory ruling: "Instead, [Plaintiffs] are, at most, third party beneficiaries. As such, their right is limited to securing the benefits of the agreement." Defendants' Summary Judgment Brief at 9. It would be odd if the Teachers could

enforce their rights under a contract, but not request that a court determine whether those prescribed rights (and duties, including payment of dues or agency fees) are valid.

The law states, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment. . . ." MCR 2.605(A)(1). The rule says "an interested party." There is no limitation here excluding a third-party beneficiary — clearly an interested party — from seeking a declaratory judgment. "Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 371; 792 NW2d 686 (2010).

B. The jurisdiction of the Michigan Employment Relations Commission is limited to unfair labor practices.

The authority and jurisdiction of the MERC is conferred by statute and circumscribed by the Employment Relations Commission Act, 423.1 *et seq*, and the Public Employment Relations Act, 423.201 *et seq*. In order to show that the Teachers' action does not fall under the jurisdiction of the MERC, we should first examine what the MERC does have jurisdiction over. Although perhaps a bit tedious, the Teachers would be remiss if they didn't provide the court with the statutory authority that the MERC does have, in order to show that the issues under appeal do not fit into any of these categories.

The authorizing statutes make it clear that the MERC has exclusive jurisdiction over only one aspect of contested proceedings under PERA,[11] charges of "unfair labor practices." Not every matter arising between an employee, the employer, or the union is an unfair labor practice over which the MERC has jurisdiction. A good understanding of what is an unfair labor practice

[11] The MERC also has jurisdiction in the conduct and certifying of representation elections, but these are not implicated here.

can be gleaned from the definition examples found in Black's Law Dictionary, 9th ed. "Examples of unfair labor practice by an employer include (1) interfering with protected employee rights, such as the right to self-organization, (2) discriminating against employees for union-related activities, (3) retaliating against employees who have invoked their rights, and (4) refusing to engage in collective bargaining. Examples of unfair labor practices by a labor organization include causing an employer to discriminate against an employee, engaging in an illegal strike or boycott, causing an employer to pay for work not to be performed (i.e., featherbedding), and refusing to engage in collective bargaining." It is clear that these do not apply to the instant matter.

MCL 423.216, being Section 16 of PERA, dictates what a statutory unfair labor practice is and defines the limits of MERC's jurisdiction: "Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission in the following manner:" At the time the Union Security Agreement was "created," Section 10 of PERA, MCL 423.210, stated, in pertinent part:

> (1) A public employer or an officer or agent of a public employer shall not do any of the following:
>
> > (a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9.
> > (b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. ….
> > (c) Discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization. However, this act or any other law of this state does not preclude a public employer from making an agreement with an exclusive bargaining representative as described in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.
> > …

> (2) It is the purpose of 1973 PA 25 to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if the requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee that may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.
>
> (3) A labor organization or its agents shall not do any of the following:
>
> (a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.
>
> …
>
> (c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c).
>
> …

Further, at that time, Section 9 of PERA, MCL 423.209, referred to in the then applicable Section 10(1)(a) and (3)(a) stated:

> 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.

This limitation on the jurisdiction of the MERC is evident in the cases upon which Appellees relied in their circuit court motion for summary disposition. "Violations of § 10 of PERA are deemed **unfair labor practices** under [MCL 423.216] remediable by the Michigan Employment Relations Commission. **We have interpreted [MCL 423.216] as vesting the MERC with exclusive jurisdiction over unfair labor practices**." *St Clair Intermediate School Dist v Intermediate Educ Ass'n*, 458 Mich 540, 550; 581 NW2d 707 (1998) (emphasis added). "Clearly, the PERA is the exclusive remedy for any **unfair labor practice charge**, and the MERC has exclusive jurisdiction to adjudicate such charges." *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 325; 605 NW2d 363 (2000) (emphasis added). Appellees

relied on *Lamphere Board of Educ v Lamphere Federation of Teachers*, 400 Mich 104; 252 NW2d 818 (1977), for the proposition that circuit courts have no jurisdiction over actions concerning PERA. However, this misreads *Lamphere*. In *Lamphere*, the school system, following a strike, sought to create a completely new tort remedy with a financial penalty for strikers. *Id* at 107-8. The *Lamphere* court held that PERA provided the exclusive remedy to the schools to penalize striking teachers. *Id* at 112. The jurisdiction of MERC in *Lamphere* was, again, held to be limited to unfair labor practices. *Id* at 117- 20.

Not all applications of PERA involve an unfair labor practice, and the MERC does not have jurisdiction over all things related to PERA. Where the MERC does not have a legislative grant of jurisdiction, it has no authority to act. See, for example, *Michigan Educ Ass'n v Christian Bros Institute of Michigan*, 267 Mich App 660, 666; 706 NW2d 423 (2005), where the court dealt with the question of whether the MERC had jurisdiction over Catholic school employees: "Therefore, we follow the reasoning of the United States Supreme Court and hold that our Legislature did not intend to grant MERC jurisdiction over lay teachers in parochial schools. It follows that MERC's orders are vacated and all the claims in the petition are dismissed." When the matter involves an action on contract, the circuit court is the one with jurisdiction. "An unfair labor practice charge must be filed with the MERC; an action for breach of contract, in the circuit court." *Senior Accountants, Analysts and Appraisers Ass'n v Detroit*, 399 Mich 449, 464; 249 NW2d 121 (1976).

In some instances where the MERC has jurisdiction over certain matters, such as matters involving the "duty of fair representation," the circuit courts exercise concurrent jurisdiction. In *Demings v Ecorse*, 423 Mich 49; 377 NW2d 275 (1985), which involved a dispute over a policeman's promotion, the court observed: "[Plaintiff police officer] combined a breach of

contract action against the employer with a breach of fair representation against the union. This combination is quite common and is another reason for allowing the courts concurrent jurisdiction both in private and public sector breach of fair representation claims." *Id.* at 63. Appellees cited *Demings*, but misconstrued the holding where they claimed: "[T]he 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." Defendants' Summary Disposition Brief at 11. Appellees cited no portion of *Demings* for this interpretation. A fairer interpretation of *Demings* is almost the opposite of what the Appellees claimed. The MERC has exclusive jurisdiction over unfair labor practices only, and unfair labor practices are the exception to the courts' general jurisdiction over labor matters. Consider the Michigan Supreme Court's observation in *Demings* on the importance of courts' retaining jurisdiction in labor matters:

> The [U.S. Supreme] Court suggested in [*Vaca v Sipes*, 386 US 182 (1967)] that courts are better able to protect the rights of individual employees than agencies: "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit… The Court concluded that it is not enough to have this right enforced by the board. "Were we to hold, as petitioners and the Government urge, that the courts are foreclosed ... from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."… The institutional argument is as applicable to the MERC as it is to the NLRB.

Demings 423 Mich at 61-62 (citations omitted). Although this passage discusses federal labor law in the context of the duty of fair representation, the Michigan Supreme Court makes clear that the same reasoning applies to the MERC in the matter at hand. This passage completely

undercuts Appellees' contention that *Demings* stands for the proposition that the MERC has jurisdiction over all PERA matters with one sole exception.

Neither Appellees nor the Circuit Court made an attempt to show why or how this matter could have been characterized as an unfair labor practice. The Appellees cited two cases where the courts rejected attempts to bring unfair labor practice cases under another characterization in circuit courts. But these two cases are not comparable to this matter, as those attempts fell easily within the standard unfair labor practice categories that were cited at length above. In *Kent Co Deputy Sheriffs' Ass'n*, the court stated: "Analogously, in Michigan's public sector, the employer's failure to release nonprotected information constitutes an unfair labor practice under the PERA, as interpreted and enforced by the MERC. MCL 423.210(1)(e)." *Kent Co Deputy Sheriffs' Ass'n*, 238 Mich App at 314. And in *Michigan ASFSCME Council 25*, the court stated:

> [W]hen 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." … 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).

Michigan AFSCME Council 25, 2007 WL 3357398 at *3. Neither of these cases provides any indication as to how this matter should have been brought as an unfair labor practice or how the circuit court would have lacked jurisdiction over the matter.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Teachers' case should not have been dismissed by the circuit court for lack of subject matter jurisdiction. The Court of Appeals should consider the matter on the merits and order that the Unions Security Agreement is invalid for the reasons given. In the alternative, the Court of Appeals should reverse the circuit court's order, and rule that the Teachers have standing and that circuit courts have subject matter jurisdiction over

matters that involve contract formation, statutory interpretation, and the constitutional limitations of a legislative body, even if these implicate PERA.

Dated: January 24, 2014

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