STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

IN THE MATTER OF WAYNE COUNTY,

Respondent/Public Employer

And

Case No. C16 K-126
Docket No: 16-033168-MERC

AFSCME COUNCIL 25, LOCAL 3317,

Charging Party/Labor Organization

_____/

Part I.

INTRODUCTION

This is the 4th in a series of unfair labor practices filed by AFSCME Local 3317 as it relates to negotiations to replace a CBA that was due to expire on September 30, 2014.

The first ULPC, being MERC Case No. C14 G-079, was tried before ALJ Travis Calderwood, a Decision was entered on May 31, 2017. The remaining (3) unfair labor practice charges, being MERC Case No. 14 G-079A, C16 B-015 and C16 K-126 have all been tried before the Commission appointed ALJ, with post-hearing briefs being filed in Case No. C14 G-079A and C16 B-015; this post-hearing

Brief deals solely with the remaining unfair labor practice charge that being C16 K-126. The pertinent portions of the 3rd ULP were stated by the Union (Charging Party) on November 22, 2016 as follows:

"UNFAIR LABOR PRACTICE CHARGE

Now comes Charging Party, AFSCME Council 25 and its affiliated Local 3317 by and through its attorney, Jamil Akhtar, P.C., by Jamil Akhtar and for its charge against the Respondent, Wayne County, states and otherwise alleges a violation of Section 10(1)(a)(b) and (c) of Act 336 of the Public Acts of 1947, as amended. For its charge, the Charging Party states as follows:

1. In 2014, Charging Party filed an unfair labor practice charge against the Respondent alleging regressive bargaining. (See 14 G-079A).

2. On or about February 10, 2016, Charging Party filed an unfair labor practice charge against the Respondent, alleging in part that the Respondent failed to bargain in good faith for (30) days, prior to the imposition of Working conditions pursuant to Section 8(11) of Act 436 of the Public

Acts of 2012 and by changing retirement provisions which were frozen until the year 2020. (Charge C16 B-015).

3. On or about August 21, 2015 the State Treasurer, pursuant to Act 436, P.A. 2012 signed a Consent Agreement placing Wayne County in receivership and appointing Warren Evans the County Executive as the Chief Administrative Officer under said Act. (Exhibit 1 – Consent Agreement).

4. On or about September 21, 2015, the Respondent, without engaging in good faith collective bargaining, for the (30) day statutory period under the provisions of Section 8(11) of Act 436 of the Public Acts of 2012, imposed what the Respondent's Chief Executive Office referred to as draconian wages, hours and other terms and conditions of employment. (Exhibit 2).

5. The Consent Agreement at section 2, specifically stated that the imposed wages, hours and other terms and conditions of employment shall remain in full force and affect until replaced by a new Collective Bargaining Agreement. (Exhibit 1)

6. On September 23, 2016, in complete violation of

Section 2, of the Consent Agreement, the Respondent imposed working conditions which were worse than the working conditions were imposed in September of 2015. (Exhibit 3).

7. The impermissible changes made in September of 2016 are identified in Exhibit 4 attached.

8. Local 3317 is the only Union in Wayne County wherein the Respondent has terminated dues check-off as punishment for the Charging Party's filing unfair labor practice charges and for implementing actions under Act 312 of the Public Acts of 1969, as amended, in the State Court, Michigan Court of Appeals and the Michigan Supreme Court.

9. The wages, hours and other terms and conditions of employment for the members of Local 3317 are worse than the comparable wages, hours and other terms and conditions of employment of County unionized employees.

14. Because of the alleged violations of Section (10) of the Act, the Respondent has actively engaged in activities in which they attempt to interfere with the administration of the Union, create chaos in the Union among its members by spreading rumors that there will be a 20% reduction in salary in order

that the Union will have to repay the County's expenses for the litigation. 15. The punitive act of the Respondent by eliminating check-off of the union dues as it relates only to the Charging Party is an act of retaliation and a violation of Section 10 of the PERA.

***WHEREFORE, CHARGING PARTY RESPECTFULLY REQUESTS** that the Honorable Commission find that the Respondent has violated Sections (10) and (15) of the Act and issue the appropriate order including, but not limited to, the relocation (sic) of the September 2015 and September 2016 imposed working conditions and the reinstatement of Charging Party's former contractual rights, and that the Commission require the Respondent to pay Charging Party's attorneys' fees for having to bring this matter before the Commission.*

Dated: November 23, 2016

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Jamil Akhtar, Attorney for Charging Party"

The genesis of this 3rd ULP charge (C16 K-126) is the Respondent entering into a Consent Agreement with the State Treasurer on August 21, 2015; this Consent Agreement required Respondent to bargain in good faith for a (30) day period with

Charging Parties. Pursuant to Section 13 of Act 312, P.A. 1969 as amended, after the Charging Party invoked the provisions of Act 312, all wages, hours and other terms and conditions of employment had to remain in effect until such a time as the parties were awarded a new contract by a statutorily appointed Arbitrator.

In October 2014, the Charging Party and Respondent entered into an agreement whereby the Respondent guaranteed, in writing, that if the Charging Party withdrew its Petition for Act 312 arbitration and allow the newly elected County Executive, Warren Evans, who took office on January 1, 2015, was to bargain with the Charging Party, in an attempt to reach a new CBA; further if such an agreement could not be reached, the Respondent agreed, in writing, that the parties would be allowed to proceed to Act 312 Arbitration.

As it turns out, in May 2015 the Evans administration presented the Charging Party with what he (Evans) publicly characterized as "Draconian" contract proposals, which caused the Charging Party to invoke its October 2014, contractual right to proceed to (Act 312) Arbitration.

Once the Respondent entered into a Consent Agreement with the State Treasurer, it moved immediately to invoke the provisions

of Act 436, P.A. 2012 (commonly known as the "Emergency Manager Act") and voided the contract to submit the outstanding issues to Act 312 arbitration.

The MERC, in its October 16, 2015 Decision, ruled that as of September 20, 2015, the Respondent was not under a duty to bargain in good faith with the Charging Party, which then allowed the Respondent to impose its wages, hours and other terms and conditions of employment on the Charging Party.

The Consent Agreement and the applicable provisions of Act 436, required the employer to bargain in good faith for a (30) day period prior to imposing new wages, hours and other terms and conditions of employment on the Charging Party. The issue as to whether the Respondent acted in good faith, during this (30) day period is now before the Commission waiting decision by the ALJ.

The Consent Agreement approved by the State Treasurer specifically stated in Section 2(c), Agreement that Respondent, once it imposed its wages, hours and other terms and conditions of employment on the Charging Party, could not change those provisions unless a new CBA was ratified by the Charging Party and the County Commission. Section 2(C) of the Consent Agreement

provides as follows:

> 2. *"Employee Relations.*
>
> *(a) In addition to and separate from powers retained and granted under section 1, the County Executive is hereby granted the powers prescribed for emergency managers under section 12(1)(1) of Act 436 to act as the sole agent of the County in collective bargaining with employees or representatives and approve any contract or agreement.*
>
> (b) *Consistent with section 8(11) of Act 436, beginning 30 days after the effective date of this agreement the County is not subject to section 15(1) of 1947 PA 336, as amended, MCL 423.215, for the remaining term of this agreement.*
>
> (c) *Beginning 30 days after the effective date of this agreement, if a collective bargaining agreement has expired, the County Executive may exercise the powers prescribed for emergency managers under section 12(1)(ee) of Act 436 to impose by order matters relating to wages, hours, and other terms and conditions of employment, whether economic or noneconomic, for County employees previously covered by the expired collective bargaining agreement. Matters imposed under this section 2(c) will remain in effect for those employees until a new collective bargaining agreement for the employees takes effect under 1947 PA 336, as amended, MCL 423.201 to MCL 423.217, or other applicable law. The authority described in this section 2(c) is in addition to the powers retained and granted under sections I and 2(a)."*

On September 21, 2015 the Respondent imposed its "County Employment Terms" (CET) on Local 3317. However, irrespective of the clear and unambiguous language of Section 2(C) of the Consent Agreement, which states that "*the imposed CET will remain in effect*

for those employees until a new CBA for the employees take effect under 1947 P.A. 336, as amended.....", the Respondent on September 20, 2016 amended the September 21, 2015 CET with new and/or additional terms of employment which were more "Draconian" in nature.

In August of 2016, just before implementing the more "Draconian" working conditions on the Charging Party the Respondent revoked the check-off of Union dues for members of Local 3317. This action of revoking the check-off of Union dues for members of Local 3317 only applied to Local 3317 and none of the other (19) labor Unions in Wayne County. The reasons stated by the Respondent for stopping the check-off of Union dues, was that the Federal Court dismissed the Union's lawsuit challenging Act 436, P.A. 2012. The Deputy County Executive, Richard Kaufman, testified that his reason for eliminating the check-off was because of the action in Federal Court. This argument, of course, is non-sequitur, because the Respondent, while the Federal lawsuit was pending, implemented the entirety of its September 21, 2015 CET and did not wait for the Federal Court to dismiss the Charging Party's

complaint, before it implemented the entirety of the terms of the CET.

The new CET implemented on September 20, 2016 provided for (14) punitive changes to the September 21, 2015 CET. These (14) changes will be discussed below.

Part II.

LEGAL ARGUMENT INTERPRETING SECTIONS 10 AND 16 OF THE PUBLIC EMPLOYMENT RELATIONS ACT (PERA)

A. Making Out A Prima Facie Case of a Violation of Sections 10 & 16 of the PERA

Wayne County Executive, Warren Evans, has a long history of violating Section 10 & 16 of the PERA. In 2008, the Commission ruled, that the then Sheriff, Warren Evans, and Wayne County violated Section 10 and 16 of the PERA, when respondent purposefully discriminated against a local Union officer and discriminated against and otherwise interfered with the local Union, representing Deputy Sheriffs in the Wayne County Sheriff's Department. (In the Matter of Wayne County, Public Employer/Respondent and Wayne County Sheriff's Local 502, Labor Organization/Charging Party, 21 MPER P58 (2008).

In this above case the Commission, in upholding the ALJ's decision, made specific reference to (a) anti-union animus or hostility to Browne's protected activity; (b) suspicious timing or other evidence that Browne's protected activity was a motivating cause of the allegedly discriminatory action; this Commission's decision, which identified the (4) elements needed to make out a prima facie case of retaliation in violation of Sections 10 and 16 of the PERA stated as follows:

> *Discussion and Conclusions of Law:*
>
> *Charging Party asserts that the Employer discriminated against Browne in retaliation for his protected activity under PERA. The elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employees' protected activities; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. Warren Con Schs, 18 MPER 63 (2005); City of St Clair Shores, 17 MPER (2004); Grandvue Medical Care Facility, 1993 MERC Lab Op 686.*

B. Introduction to Argument:

The Charging Party alleges that the actions taken by the Respondent in eliminating check-off of Union dues in August 2016 and the (14) changes to the September 20, 2016 CET (Exhibit 26), was done in retaliation for Local 3317 filing unfair labor practice

charges, demanding Act 312 Arbitration pursuant to a private contractual agreement and continuing in the Circuit Court action to have the then present contract enforced during 2015, 2016 and 2017. This ULP charge, C16 K-126 does not deal with the changes in the conditions of employment imposed on September 21, 2015 (Exhibit 16); however, an element of this ULP charge is that the Consent Agreement, states that the CET imposed in September 2015 must remain in effect until replaced by a new CBA. (Exhibit 25, Consent Agreement).

It is the Charging Party's position that the retaliation as alleged to have taken place, in violation of Section 10 and 16 of the PERA, deals only with the fact that the Charging Party, continued to prosecute its ULP charges, which were filed prior to September 21, 2015 (C14 G-079 and C14 G-079A). The Charging Party's complaint is to be determined based upon the totality of the circumstances and evidence; using this standard, Charging Party has clearly shown that the "Draconian" actions taken by the Respondent were in total violation of Sections 10 and 16 of the PERA.

With this statement being made, Charging Party, AFSCME Local 3317 now sets forth its arguments in proving a prima facie case of

retaliation and anti-union animus in violation of Sections 10 and 16 of the PERA.

1. **Union or other protected activity**

AFSCME Local 3317 adopts its arguments contained in its Post-Hearing Briefs in Case No. C14 G-079A and C16 B-015 in support of its argument in this case, C16 K-016, to support its argument, Charging Party states that a review of the totality of the circumstances proves a violation of Sections 10 and 16 of the PERA.

The Deputy County Executive, Richard Kaufman, on September 17, 2015, while the parties were engaged in last minute collective bargaining, with the aid of two State Mediators; as said bargaining was necessitated by Section 2(c) of the Consent Agreement, which required (30) days of good faith bargaining prior to the implementation of the Respondent's CET; Richard Kaufman made it clear, in his argument to a Federal Judge, that Respondent had no desire to enter into a CBA with Local 3317, because the Respondent's paramount concern was setting up a scenario which would allow the 700 employees of the Wayne County Sheriff's Department, represented by the Police Officers Association of Michigan (hereinafter POAM) to ratify a new contract.

Instead of imposing the same wages, hours and other terms and conditions of employment on Local 3317, which were contained in the tentative agreement with the POAM, the Respondent determined to punish Local 3317 for refusing to accept the same terms and conditions of employment which were negotiated with and agreed to by all other Unions, with the exception of the POAM, which received sweeteners in order to get the POAM contract ratified; the existing POAM contract did not expire until September 30, 2016.

In addition to the elimination of check-off of Union dues in August 2016, the Respondent in September of 2016 implemented the following changes to the 2015 CET:

1. Elimination of Act 312 eligibility language (Tr 11-6-17, Pg 76)

2. Elimination of agency shop and check-off of Union dues (Tr 11-6-17)

3. Elimination of Union Executive Board members time off with pay (Tr 11-6-17, Pg 78)

4. Change in the demotion language (Tr 11-6-17, pgs. 79-81)

5. Elimination of the birthday holiday (Tr 11-6-17, pgs. 81-82)

6. Change in the sick time payoff provisions (Tr 11-6-17,

pgs. 82-83)

7. Changes in the uniform allowance (11-6-17, pgs. 83-84)

8. Change in life insurance (Tr 11-6-17, pgs. 84-85)

9. Elimination of prepaid legal insurance (Tr 11-6-17, pgs. 85-86)

10. Changes in retirement/post-retirement medical (Tr 11-6-17, pgs. 87-88)

11. Change in retirement eligibility (Tr 11-6-17, pgs. 88-89)

12. Wage increase (Tr 11-6-17, pgs. 89-94)

13. Changes in seniority status (Tr 11-6-17,)96-97

14. Implementation of the "Turfe" clause, (Tr 11-6-17, pgs. 97-103)

The Union was involved in a section 9 and 10 protected activity by filing three ULP charges. The right to file ULP charges is an activity protected under the PERA; therefore, AFSCME Local 3317 has met its burden under the first part of a prima facie case.

2. **Employer's knowledge of the activity.**

There is no question that Respondent had full knowledge of the pending ULP charges; on November 22, 2016 the Respondent filed a Motion to Dismiss the 4 pending ULP'S, stating that the MERC

lacked subject matter jurisdiction over the pending ULP charges. (Exhibit 1-this Brief).

After briefing by the parties and oral arguments, this ALJ issued his Interim Decision and Order as to the Respondent's November 22, 2016 Motion to Dismiss. Judge Calderwood's Order was released on March 3, 2017. (Exhibit 2 – this Brief).

There is no question that the Respondent had full and complete knowledge of the pending ULP's which constitutes the protected activity outlined in Part I of the prima facie case elements.

3. **Employer's animus or hostility towards the employees' protected activities.**

During the hearings in the (3) ULP charges, Deputy County Executive, Richard Kaufman, showed his disdain for Local 3317's refusal to roll over and accept the demands of the County Executive, the State Treasurer's appointed Chief Administrative Officer under the Consent Agreement. In reviewing the transcript of the hearing on October 4, 2017/pgs. 37 - 43, and a review of hearing Exhibit 22, this testimony/transcript of the September 17, 2015 during the Federal Court hearing, clearly shows the animus held by the Respondent as directed toward AFSCME Local 3317.

More astonishing then the statements made by Kaufman in the Federal Court hearing is the reason given by Deputy County Executive Kaufman, as it relates to the reason given by the Respondent, to stop check-off of the Union dues, in August 2016. Deputy County Executive Kaufman at the October 4, 2017 hearing stated said reasons as follows:

"3 (Charging Party Exhibit 26 received)
4 Q Part of the charge is that in August of 2016 the County
5 Executive determined to stop check-off of union dues for
6 Local 3317 and its members. Why did you do that?
7 A Because the County had no obligation to collect them and it
8 saved administrative costs.
9 Q There's what?
10 A It saved administrative costs.
11 Q Isn't it true that Local 3317 as of August of 2016 was the
12 only union in Wayne County that did not have its membership
13 and its union dues taken out of the members' checks?
14 A They were the only union we didn't have an obligation to
15 pursuant to a Collective Bargaining Agreement.
16 Q What Collective Bargaining Agreement are you making
17 reference to?
18 A All the other Collective Bargaining Agreements that we
19 entered into with all the other unions.
20 Q So are you making reference to the two CET's as being
21 Collective Bargaining Agreements?
22 A No.
23 MR. FURTON: Objection.
24 JUDGE CALDERWOOD: Yes.
25 MR. FURTON: That's been asked and answered. He
0050
1 clearly stated what he was -- he has Collective Bargaining
2 Agreements with every other union. That was his answer.
3 It's asked and answered.
4 Q Well, did you have a Collective Bargaining Agreement with
5 Local 3217?
6 A No, we had County employment terms.
7 Q Which gave you the right to stop taking out union dues;

8 right? It didn't say you wouldn't do it, it said you have a
9 right to stop check-off of union dues?
10 A I believe that's what the language is. I can look at it to
11 make sure, but, yes, I believe it says that we had no
12 obligation to collect union dues.
13 Q And what is your reason for stopping 11 months after you
14 imposed the CET on Local 3317 to stop the check-off of union
15 dues?
16 A Well, the same answer, with this modification. We would
17 have stopped collecting the dues immediately on imposition
18 in order to save some administrative fees, but you filed a
19 case in court that raised an objection to that with respect
20 to the court. We had the issue before them. We thought it
21 was a sign of respect to the court to let the court decide
22 the validity of the County imposed terms before we took that
23 action, so we waited for the federal court judge to make
24 that decision.
25 Q So in retaliation for Local 3317 filing an appeal in the

0051
1 Sixth Circuit, you determined to stop their union dues?
2 A Absolutely not, that's not what I said.
3 Q What did you say?
4 MR. FURTON: Objection. I mean his record of --
5 we're taking a transcript what he said, and this is just
6 argumentative.
7 JUDGE CALDERWOOD: Right. Move on, please, in
8 terms of another question because asking him what he just
9 said --
10 MR. AKHTAR: Sure.
11 JUDGE CALDERWOOD: Thank you.
12 Q Who was involved in this determination?
13 A The determination to no longer collect dues on behalf of
14 3317?
15 Q Yes.
16 A It's a combination of discussion of a lot of people, I know
17 the County Executive, myself, I think Mr. Wilson was
18 involved in the discussion. There was probably others.
19 Q And did you notify the union that you were going to stop
20 taking or collecting union dues or did you just do it
21 unilaterally? What's your recollection?
22 MR. FURTON: Objection; compound.
23 JUDGE CALDERWOOD: Rephrase.
24 Q Did you notify the union prior to your decision to stop
25 taking our union dues?

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1 A I think so, but I don't recall.
2 Q Did you contact the union's members directly at their home
3 address and advise them that you would no longer be taking
4 out their union dues?
5 A I don't recall exactly what we did, and I relied upon our
6 Director of Labor Relations to take care of that, and if he
7 needed advice from either -- the County Executive, I assumed
8 he would have asked, but I don't recall any specific
9 discussions about that.
10 Q So it was the County Executive and Director of Labor
11 Relations who made that determination?
12 A Which determination?
13 Q To mail letters directly to the membership and not to the
14 Union.
15 A Again, I don't recall specifically what our discussion was
16 or who made the decision, but I was certainly part of those
17 discussions and part of the process to come to a decision.
18 Q Okay. So the only reason that you have testified to today
19 deals with federal litigation; is that correct?
20 MR. FURTON: Objection. Again, I know what he
21 testified to. It's on the record and I object to the
22 argumentative nature of it and the misleading nature.
23 JUDGE CALDERWOOD: I'm just confused by the
24 question because I'm not sure what it is you're referring
25 to.

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1 Q I asked you what was the reason why you stopped taking out
2 union dues from Local 3317 members.
3 A Right.
4 Q And you made reference to federal litigation; is that
5 correct?
6 JUDGE CALDERWOOD: He made reference to it, but he
7 did answer the question as to why he stopped. The
8 testimony, and I do this for sake of expedience, the
9 testimony regarding the federal litigation was given as to
10 why the waited 11 months to stop. So please be more clear
11 in your question.
12 Q Were there any other reasons?
13 JUDGE CALDERWOOD: Reasons for what?
14 Q Stopping the check-off for union dues.
15 A That I gave? No.
16 Q Do you believe it's appropriate to have direct mail contact

17 with members of Local 3317 advising them that you have
18 stopped taking out their union dues?
19 A I'm not a labor lawyer. I don't know the answer to that."

Kenneth Wilson, the Labor Relations Director for Wayne County, testified on November 6, 2017, that the order to stop the check-off of Local 3317's Union dues came from the 30th Floor, that being the County Executive's office. (Tr. 11-6-17, pgs. 30 – 34)

In further proof that the Respondent was determined to punish the Charging Party and to interfere with the internal operations of Local 3317, is clearly demonstrated by the fact that the Respondent bypassed the leadership of the Union and communicated directed with Local 3317 members. In August of 2016 the determination was made by the County Executive to stop the check-off of Union dues and rather than notifying the leadership of the Union, the County Executive decided to notify the individual members of Local 3317 by way of a letter sent via U.S. Mail to Local 3317's members home address; advising them that the Respondent would no longer deduct their Union dues from the paychecks.

Robert Keys, the President of Local 3317 testified as to the harm this did to the Charging Party and the leadership of the Union, in its ability to carry out their duties, responsibilities and

rights under the PERA. (Tr 11-6-17, pgs. 6 - 19). Further, Richard Johnston, Staff Representative from AFSCME Council 25 likewise testified that there was no notice of the Respondent's determination to stop the check-off of Union dues and that there were problems associated with administering the internal affairs of the Union. (Tr 11-6-17, pgs. 20 - 29).

Lastly, union officer, Jacques Belanger, testified as to the havoc the decision of the Respondent to mail letters directly to the members of the Charging Party caused internal chaos within the Charging Party amongst its members and was an attempt to diminish the Charging Party's ability to manage its affairs. (Tr 11-6-17, pgs. 61 - 64).

See the holding in **NLRB v Gissel Packing Co.**, 395 U.S. 575, (1969) 71 LRRM 2431, at 2497. In **Gissel Packing Co.,** the Supreme Court stated what problems could be faced by the Charging Party when an employer inappropriately communicates directly with his employees as follows:

> *"... an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He*

may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control, or to convey a management decision already arrived at to close the plant in the case of unionization... If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities_ and known only to him, this statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof ... As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." (citations omitted)"

(Gissel at 581)

Based upon the totality of the circumstances and evidence, the Charging Party has met its burden under the third prong for proving a prima facie case.

4. <u>Suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action.</u>

As state in **<u>Wayne County Sheriff, Local 502</u>**, 21 MPER P58, the Commission determined that the 4th element of the prima facie

case can be proven with direct and/or circumstantial evidence. The MERC in Local 502 stated as follows:

> *"Inferences of animus and discriminatory motive may be drawn from circumstantial evidence, including the pretextual nature of the reasons offered for the alleged discriminatory actions. Volair Contractors, Inc, 341 NLRB 673 (2004); Tubular Corp of America, 337 NLRB 99 (2001); Washington Nursing Home, Inc, 321 NLRB 366, 375 (1966). Unlawful discriminatory actions may consist of formal discipline or, as in this case, of informal but objectively and materially adverse changes in assignments or working conditions, such as assignments to less challenging or more onerous work, as here, or to an undesired shift. Burlington N & Santa Fe Ry Co v White, 2006 US LEXIS 4895 (2006)."*

The MERC has also held "*although anti-union animus may be proven by indirect evidence, mere suspicion or surmised will not suffice; rather the Charging Party must present substantial evidence from which a reasonable inference of discrimination may be drawn;*" **MERC v Detroit Symphony Orchestra,** 393 Mich 116, 126 (1974).

It has also been held by the MERC that once a prima facie case has been established by a preponderance of evidence, the burden then shifts to the employer to produce credible evidence of a legal motive and that the same action (as alleged in this ULP charge) would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the Charging Party. **City of Saginaw 1997 MERC Lab Op 414, 419.**

Based upon the totality of the circumstances, as spelled out and incorporated in the Charging Party's post-hearing Briefs, as set out in the previous (2) ULP charges (C14 G-079A and C16 K-015) and when said arguments are incorporated with the arguments set forth above, it is clear that in addition to "suspicious timing" that there is other evidence that the protected activity as alleged by Charging Party, was a motivating cause of the alleged discriminatory action.

Here again AFSCME Local 3317 points to the fact that the Respondent was overly aggressive in its attempt to have this Honorable ALJ and Commission to dismiss the (4) pending ULP charges when it filed its November 2 2, 2016 Motion to Dismiss. Said Motion to Dismiss included all (4) charges. (Exhibit 1 and 2 – this Brief). It is clear that based upon the evidence presented at the hearings and the law relied upon by AFSCME Local 3317, that a prima facie case has been established and that the so-called legitimate business reasons for eliminating dues check-off and forcing Local 3317 on and after September 20, 2016 to be subjected to working conditions imposed by the September 21, 2015 CET and which are worse that the working conditions bargained for by and with the POAM Bargaining Unit. As stated above, the 2nd CET dated

September 20, 2016 treated the members of Local 3317 worse than the provisions of the POAM contract. (Exhibit 26).

A further example of the anti-Union animus shown by the Respondent is the language which the "30th Floor" instructed Kenneth Wilson, the Labor Relations Director, to insert into the POAM contract which had the net effect of punishing members of Local 3317 who wanted to demote into the POAM Bargaining Unit. (Tr 11-4-17, 10-4-17, Brian Earl pgs. 10 - 21); (Tr 11-6-17 Belanger, pgs. 78 - 81). The evidence is overwhelming, in that the Charging Party is able to make out a prima facie case of discrimination and anti-Union animus; that the stated legitimate business reasons by the Respondent in its implementation of its "Draconian" working conditions, was a pretext for discrimination and anti-union animus, which is prohibited under Sections 10 and 16 of the PERA; therefore the ULP charge dated November 22, 2016 filed by AFSCME Local 3317 should be upheld in all respects.

Part III. DAMAGES

The Michigan Court of Appeals in **Shelby Twsp v Command Officers, Ass'n. of MI**, (unpublished Decision; Dkt No. 323491,

decided December 15, 2015) (Exhibit 3-this Brief) stated the MERC's authority to fashion a remedy as follows:

> ***"Additionally, we note that MERC may impose any remedy that would make affected employees whole. See Pontiac Firefighters Union Local 376 v Pontiac; 482 Mich 1, 10; 753 NW2d 595 (2008).***

The Supreme Court in the **Pontiac** case set forth MERC's authority to fashion a remedy as follows:

> *"MERC or a Grievance Arbitrator can award back pay, order reinstatement or provide another remedy to make the laid-off firefighters whole."*

With this extraordinary authority to fashion an appropriate remedy relating to an ULP charge, brought by a Union under Sections 9, 10 and 16 of the PERA, AFSCME Local 3317 requests the following remedy:

1. The Respondent be required to return to the status quo as it relates to check-off of Union dues and to pay to the Charging Party the amount of Union dues it would have collected but for the violation Sections 10 and 16 of the PERA.

2. Return to the status quo as to the (14) articles of the contract which AFSCME Local 3317 identified during the hearing wherein Sgt. Jacque Belanger testified, were the articles of the contract in which Local 3317 was treated differently than the police officers of the Wayne County Sheriff's Department represented by the POAM. It is important to note that Sgt. Belanger's testimony was not rebutted in any way by the Respondent. (Tr 11-6-17, pgs.

103-108).

As to these (14) issues, the record is complete and unchallenged by the Respondent, that the testimony given by Sgt. Belanger relating to the individual articles in the POAM contract, when compared to what the Respondent imposed on AFSCME Local 3317, were terms and conditions of employment that represented working conditions, that were far more superior than the wages, hours and other terms and conditions of employment imposed on AFSCME Local 3317.

Further, Richard Johnson, AFSCME Staff Representative, testified that AFSCME Local 3317, was the only Union under the AFSCME Council 25 umbrella, which used its own attorney to assist the Local in its bargaining and other related issues. (Tr 11-6-17, pgs. 20 - 30)

The Charging Party's rights under Sections 10 and 16 of the PERA, to select its own representative for bargaining, in this case the local Union's attorney, could have been impacted by the Respondent eliminating dues check-off, which in turn would limit the financial ability of AFSCME Local 3317, to hire its own attorney to represent the Union at the bargaining table, and to assist the Union in filing

and prosecuting ULP charges. This nexus of curtailing the Charging Party's ability to collect Union dues, by way of check-off and paying for the Charging Party's attorney to represent the Union at the bargaining table and in prosecuting ULP; charges is obvious. As far as Local 3317 can argue this point to the Commission, it appears to be a matter of first impression, i.e. discriminating against a local Union because of the selection of an attorney to represent Local 3317 at the bargaining table and in prosecuting its ULP charges.

It is true that the long-standing history of the PERA shows that it is, in fact, an unfair labor practice for an employer to attempt to regulate who the Charging Party selects to represent it at the bargaining table and prosecute its ULP charges before the MERC. The MERC has long held that it is an ULP for an employer to attempt to dictate to the Union the composition of its bargaining team. In **Benton Twps. And International Ass'n of Firefights Local 1562;** MERC Case No. C66 H-93; 1966 MI ERC, Lexis 18, the MERC established this principal as follows:

> *"Almost equally offensive to employee rights under the Act is the rule limiting the union negotiating team to the Local 1562 president and one other officer or member. The unilateral imposition of the rule without prior bargaining is in itself a refusal to bargain in violation of Section 10(e). Composition of*

bargaining teams may be discussed in negotiations, but the public employer may under no conditions dictate the makeup of the employees' bargaining team. Section 9 specifically guarantees the right of public employees to bargain through representatives of their own free choice. This means they may insist upon counsel from, and active participation by attorneys and representatives from a state or national office of the union. To limit the Union's team to unit employees, generally woefully inexperienced in collective bargaining techniques, is effectively to annihilate the right to engage in collective bargaining, Again, a caveat is in order, in that the right of the union to choose its own representatives is not an absolute right. Presumably the union could not insist that an unlimited number of employees and experts actively take part in negotiations. Even in that event it would not be the prerogative of the employer to dictate the makeup of the union team. The employer would be confined to objecting to proceeding in an unwieldy, goldfish bowl atmosphere."

The Charging Party in its first (2) post-hearing Briefs in this ULP trilogy, brought the "**Dish**" decision of the NLRB to this Honorable ALJ's attention; in so far as the NLRB's Decision in **Dish** parallels many of the issues which are now pending before this Honorable ALJ, Local 3317 incorporates its **Dish** argument as supporting a precedent for the Charging Party's request to return the (14) articles of the Local 3317, 2011 - 2014 Contract as testified to by Sgt. Jacque Belanger, said testimony was not challenged by the Respondent in their cross-examination of Sgt. Belanger. (Tr 11-6-17, pgs. 59 – 112).

MERC has it within its authority, as the prominent body to interpret the PERA, to fashion a remedy requested by AFSCME Local 3317 (**Pontiac Firefighters Local Union**, supra).

Part IV. CONCLUSION

Wherefore, Charging Party, AFSCME Local 3317, respectfully requests that this Honorable ALJ, based upon the totality of the circumstances and evidence, find that Respondent violated Sections 10 and 16 of the PERA; that the dues check-off for Local 3317 be reinstated retroactive back to August 2016; further that the contractual rights and benefits which the POAM members enjoy and which were denied to Local 3317 members be recognized as a "Draconian" act on the part of the Respondent; lastly that the members of Local 3317 be awarded its costs and attorneys' fees as prayed for in charges C14 G-079A and C16 B-015.

Dated: February 26, 2017

Jamil Akhtar, Attorney for
Charging Party
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Exhibit #1

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Wayne County,

Respondent/ Public Employer,

v.

AFSCME Local 3317,

Charging Party/Union,

MAHS Case No. C15 G-079
MAHS Case No. C16 B-015
MERC Case No. 15-037169
MERC Case No. 16-003534

Hon. Travis Calderwood
Administrative Law Judge

/

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/

RESPONDENT WAYNE COUNTY'S POSITION STATEMENT AND MOTION TO DISMISS DUE TO LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO P.A. 436 AND MICHIGAN CONSTITUTION 1963, ARTICLE 1, SECTION 10. ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Wayne County is entitled to dismissal due to lack of subject matter jurisdiction under P.A. 436 and the Consent Agreement between the State of Michigan and Wayne County. The Michigan Court of Appeals in a published decision binding[1] on this tribunal, described how,

[1] MCR 7.215(C)(2).

during a local government's financial emergency, the provisions of P.A. 436 controlled over more general state legislation: "As a remedial statute, 2012 PA 436 exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation. It is axiomatic that 'when two statutes appear to control a particular situation, the more recent and more specific statute applies'"[2]

II. QUESTIONS PRESENTED

The State of Michigan, through its State Treasurer, and Wayne County are parties to a "Consent Agreement" expressly authorized under P.A. 436. This Position Statement and Motion to Dismiss addresses the following issues relating to unfair labor practice (ULP) charges brought by AFSCME 3317 against Wayne County under section 15(1) of PERA:

1. Q: What is the expiration date for section 2(b) of the Consent Agreement adopted pursuant to section 8(11) of P.A. 436 which provides that Wayne County "is not subject to section 15(1) of [PERA]?"[3]

1. A: Section 2(b) expires on October 1, 2018[4].

2.Q: If Wayne County is not subject to section 15(1) of PERA under the express provisions of section 8(11) of P.A. 436 and section 2(b) of the Consent Agreement until October 1, 2018, what effect do these provisions have on any pending ULP charges brought by AFSCME 3317?

2. A: Any pending ULP charges against Wayne County must be dismissed forthwith for lack of subject matter jurisdiction over Wayne County[5] pursuant to both P.A. 436 and the Consent Agreement. In other words, MERC has no subject matter jurisdiction by *statute* and by *contract* between Wayne County and the State of Michigan.

3. Q: Does section 8(11) of P.A. 436 hold more weight than PERA?

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[2] *Martin v Murray*, 309 Mich App 37, 48-49 (2015).

[3] MCL 423.215(1).

[4] Letter from the Deputy State Treasurer to Wayne County CEO dated November 10, 2016. See Exhibit 5.

[5] *City of Lansing v. Carl Schlegel*, 257 Mich App 627 (2003).

3. A: As a remedial statute, PA 436 exists to provide specific tools for resolving financial emergencies within local governments which are not available under more general legislation. When two statutes appear to control a particular situation, the more recent and more specific statute applies.[6] By its own terms, P.A. 436 jurisdictionally removes the County from PERA proceedings under MCL 423.215.

4. Q: Does *Capac Community Schools* and *Taylor School District* provide meaningful guidance to these issues?

4. A: Neither *Capac Community Schools* nor *Taylor School District* provide any meaningful guidance to either the Consent Agreement expiration issue or the MERC lack of subject matter jurisdiction issue. The *Capac Community Schools* decision does provide support for the proposition that MERC may look to the State Treasurer's office for guidance in matters involving that office. In the present case, the County submits that it is bound by statute and by contract to the State Treasurer's determination, because "as a remedial statute, 2012 P.A. 436 exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation. It is axiomatic that 'when two statutes appear to control a particular situation, the more recent and more specific statute applies."[7] While the Michigan Court of Appeals has determined that P.A 152 was subordinate to PERA, that same court has held that P.A. 436 controls over more general legislation.[8]

5. Q: If MERC fails to dismiss the County pursuant to section 2(b) of the Consent Agreement, does that violate the Mich Const 1963, art 1, sec 10?

5. A: The County is not subject to section 15(1) of PERA as a matter of contract between the State and the County and these contractual rights cannot be impaired under Mich Const 1963, art 1, sec 10 by invocation of MERC rules or PERA.

Wayne County is entitled to immediate dismissal of all pending ULP charges for lack of subject matter jurisdiction.

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[6] *Martin v. Murray*, 309 Mich App 37, 48-49 (2015).

[7] *Martin v. Murray*, supra. at 48-49.

[8] Given that the text section 8(11) of P.A. 436 expressly removes the County from PERA jurisdiction, the oft-cited principle that PERA controls over more general legislation does not apply to P.A. 436.

III. RELEVANT FACTUAL BACKGROUND

On July 21, 2015, the Wayne County Financial Review Team issued a report[9] which concluded that a "financial emergency" existed within Wayne County in accordance with Section 5(4)(b) of Public Act 436 ("PA 436").[10] Subsequent to declaring a financial emergency, the County entered into a "Consent Agreement" with the State of Michigan (through the State Treasurer)[11] as expressly authorized under Section 8 of P.A. 436.[12] Included in the Consent Agreement was a provision, expressly authorized by P.A. 436[13] that *jurisdictionally removes* the County from any claims relating to the duty to bargain during the term of the agreement:

"2(b) Consistent with section 8(11) of Act 436, beginning 30 days after the effective date of this agreement the County is not subject to section 15(1) of 1947 PA 336, as amended, MCL 423.215, for the remaining term of the agreement."[14]

The Consent Agreement was entered into on August 21, 2015[15] as its "effective date" and the Consent Agreement provisions of section 2(b) became effective 30 days later: September 20, 2015.[16] After the effective date of the Consent agreement, the County was able to reach agreement with all but one of its collective bargaining units, including two AFSCME units, the

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[9] Exhibit 1. All attached exhibits are admissible under MRE 201, 202, 402 and 803(8); R 423.172(h) and (i).

[10] MCL 141.1545(4)(b).

[11] Exhibit 2.

[12] MCL 141.1548.

[13] MCL 141.1548(11).

[14] Exhibit 2, p.3, section 2(b).

[15] Exhibit 2, p.11, section 20.

[16] Exhibit 2, p.3, section 2(b).

Supervisor and Non-Supervisor locals. AFSCME Local 3317 ("3317") was the only collective bargaining unit to refuse to reach an agreement with the County and as a result on September 21, 2015 "County Employment Terms" or "CET" was imposed upon 3317 pursuant to the Consent Agreement.[17] 3317 is the charging party on three ULP charges against the County alleging that the County violated its duty to bargain under section 15(1) of PERA.[18]

On October 18, 2016, the State Treasurer issued a letter[19] to the Wayne County CEO certifying under sections 10 and 11(a) of the Consent Agreement[20] that the "County has successfully completed and is hereby released from its Consent Agreement." On November 10, 2016, The Deputy State Treasurer sent a follow-up letter[21] clarifying that the two-year budget contemplated by the Treasurer at the time of release, and to which section 2(b) is tied, would be enforceable through September 30, 2018. Wayne County is not under a duty to bargain until October 1, 2018.

By contrast, 3317 believes that section 2(b) of the Consent Agreement has expired and MERC/MAHS should schedule/ajudicate the three outstanding ULP charges. This is contrary to the express language of section 10 and 11(a) which provide that the jurisdiction removal in section 2(b) *survives* the Release Date. After two telephone status conferences, ALJ Travis Calderwood issued an email dated October 28, 2016 requesting Position Statements from the

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[17] Exhibit 2, p.3, section 2(c).

[18] MCL 423.215.

[19] Exhibit 3.

[20] Exhibit 2, pp.8-9, sections 10- 11(a).

[21] Exhibit 5.

parties regarding the expiration of the Consent Agreement and its effect on the pending ULP charges with instructions to address potential applicability of the two MERC decisions.[22]

IV. ARGUMENT

This Position Statement and Motion to Dismiss pursuant to PA 436 addresses the ALJ's inquiry as follows:

A. Section 2(b) of the Consent Agreement survives the agreement's Release Date under sections 10 and 11(a) through September 30, 2018;

B. Under Section 2(b) and P.A. 436, MCL 141.1548(11), the "County is not subject to section 15(1) of [PERA]" and therefore MERC is without jurisdiction to hear such charges;

C. As a remedial statute, PA 436 exists to provide specific tools for resolving financial emergencies within local governments which are not available under more general legislation. When two statutes appear to control a particular situation, the more recent and more specific statute applies.[23] By its own terms, P.A. 436 jurisdictionally *removes* the County from PERA proceedings under MCL 423.215. Moreover, P.A. 436 of this Consent Agreement survived AFSCME's attempt to invalidate them on constitutional grounds.[24]

D. Neither *Capac Community Schools* nor *Taylor School District* provide any meaningful guidance to either the Consent Agreement expiration issue or the MERC lack of subject matter jurisdiction issue. The *Capac Community Schools* decision does

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[22] *Case # 13-275-MERC and Case # 13-7942-MERC*

[23] *Martin v. Murray*, 309 Mich App 37, 48-49 (2015).

[24] Exhibit 4 *AFSCME Council v. Wayne County*, WL 3924114 (2016).

provide support for the proposition that MERC may look to the State Treasurer's office for guidance in matters involving that office. In the present case, the County submits that it is bound by statute and by contract to the State Treasurer's determination, because "as a remedial statute, 2012 P.A. 436 exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation. It is axiomatic that 'when two statutes appear to control a particular situation, the more recent and more specific statute applies."[25] While the Michigan Court of Appeals has determined that P.A 152 was subordinate to PERA, that same court has held that P.A. 436 controls over more general legislation.[26]

E. The County is not subject to section 15(1) of PERA as a matter of contract between the State and the County and these contractual rights cannot be impaired under Mich Const 1963, art 1, sec 10 by invocation of MERC rules or PERA.

Accordingly, all pending ULP charges should be dismissed forthwith under P.A. 436 for lack of subject matter jurisdiction.

A. Under the express provisions of the Consent Agreement, as clarified by the Deputy State Treasurer's letter dated November 10, 2016 the jurisdictional removal of the duty to bargain under MCL 141.1548(11) is enforceable through September 30, 2018.

The Consent Agreement does not contain a singular "Release Date" for all obligations. While the general Release Date is October 18, 2016, the date of the State Treasurer's Release letter to Wayne County, section 10 provides that the Consent Agreement:

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[25] *Martin v. Murray*, supra. at 48-49.

[26] Given that the text of section 8(11) of P.A. 436 expressly removes the County from PERA jurisdiction, the oft-cited principle that PERA controls over more general legislation does not apply to P.A. 436.

"...remains effective until the Release date under section 11(a) ...except that sections *2(b)* to 2(f) and 5 *survive the Release Date under section 11(a)* and continue in effect for the remaining term of this agreement, which expires at the end of the last fiscal year after the Release Date covered by the two-year budget adopted under section 11."

Section 2(b) states that: "...the *County is not subject* to section 15(1) of [PERA]." Section 15(1) of PERA encompasses the duty to bargain and provides the jurisdictional basis for MERC to adjudicate unfair labor practice charges. Section 2(b) via section 10, survives the Release Date "covered by the two-year budget adopted under section 11."

Section 11(a) identifies which two-year budget is referenced in section 10: "...effective beginning on the first day of the fiscal year beginning after the Release Date." The County's fiscal year starts on October 1st and ends on September 30th. Section 2(b) "expires at the end of the last fiscal year after the Release Date covered by the two-year budget adopted under section 11." The Deputy State Treasurer's letter dated November 10, 2016 clarifies that the "two-year budget contemplated by the department at the time of release was for the fiscal years 2017 and 2018.". Thus, section 2(b) expires at "the end of the last fiscal year...covered by the two-year budget," which is, September 30, 2018.

The County is not subject to 15(1) of PERA through September 30, 2018 by operation of P.A. 436 and by contract with the State of Michigan.

B. MERC has no jurisdiction to adjudicate any unfair labor practice charges during the pendency of section 2(b) of the Consent Agreement pursuant to P.A. 436.

The provisions of PA 436, by its plain statutory language, *remove* the County's duty to bargain by removing the County from any obligations under MCL 423.215(1). P.A. 436 also provides that the County "is not subject to 15(1) [of PERA]...for the remaining term of the

consent agreement" which in turn divests this tribunal of subject matter jurisdiction to consider any charges brought against the County. Thus dismissal of all claims is required.

"Jurisdiction is the power of the court to act and the authority of the court to hear and determine a case."[27] Subject matter jurisdiction describes the types of cases and claims which a court has authority to address.[28] The Michigan Supreme Court has held that if a court does not have subject matter jurisdiction over a case, the only action it can take is to dismiss the case.[29]

Subject matter jurisdiction over a judicial proceeding is an absolute requirement and it cannot be conferred by consent, conduct, waiver or estoppel.[30] In fact, a court must take notice *sua sponte* of lack of subject matter jurisdiction, regardless of whether the parties raise the issue.[31] MERC only has the jurisdiction given it under applicable law.[32]

PA 436, MCL 141.1548(11) states:

> "Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this act, that *local government is not subject* to section 15(1) of 1947 PA 336, MCL 423.215 for the remaining term of the consent agreement." (emphasis added).

"Not subject to section 15(1)" under express text of PA 436 means that this tribunal has no authority to hear or take action against the County on any alleged section 15(1) or 10(1)(e) violations of PERA as of September 20, 2015. PA 436 is clear and unambiguous that it is the "local government" that is not subject to section 15(1) of PERA as of 30 days after the Consent Agreement, and this statutory exclusion continues for the remainder of its term. This statutory exclusion is not limited by the date of any alleged violation(s). Therefore a plain application of

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[27] *In Re AMB*, 248 Mich App 144, 166 (2001)
[28] *Id.*
[29] *Bowie v. Arder*, 441 Mich 23, 56 (1992)
[30] *In Re AMB*, at 166.
[31] *Id.*
[32] *City of Lansing*, supra. at 632-633

the statute requires that any and all ULP charges currently pending against the County based on sections 15(1) and 10(1)(e) must be immediately dismissed for lack of subject matter jurisdiction pursuant to MCL 141.1548(11).

The Michigan Court of Appeals decision in *City of Lansing v. Carl Schlegel*[33]sets out the interpretive framework for subject matter jurisdiction disputes under PERA. A private subcontractor brought a ULP charge against the City of Lansing. MERC denied the charge based on lack of subject matter jurisdiction. The Court of Appeals affirmed, finding that the charging party was not a "public employee" under PERA and "subsection 1(e)(i) was enacted to further define the limits of PERA's coverage."[34] The Court of Appeals determined that subject matter jurisdiction was tied to whether the charging party was subject to PERA. In the present case, there is no subject matter jurisdiction because the County, under P.A. 436, is expressly not subject to PERA, section 15(1) and its duty to bargain. In conceptual terms, the County, from September 20, 2015 through September 30, 2018, is entitled to dismissal in the same manner that any other non-PERA Michigan employer would be: General Motors, Ford, DTE, Brother Rice High School[35] etc.

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[33] 257 Mich App 627 (2003)

[34] *City of Lansing*, at 632.

[35] *Christian Bros*, supra.

C. As a remedial statute, PA 436 exists to provide specific tools for resolving financial emergencies within local governments which are not available under more general legislation. When two statutes appear to control a particular situation, the more recent and more specific statute applies.[36] By its own terms, P.A. 436 jurisdictionally removes the County from PERA proceedings under MCL 423.215.

Section 8(11) of P.A. 436 and section 2(b) of the Consent Agreement do not exist as a "get-out-of MERC-free" card as an end in and of itself. Rather, it is a necessary tool to counter the underlying causes of financial emergencies faced by local governments in this State. The present Consent Agreement (p.1) requires the County to take "remedial measures" to:

1) Improve the County's cash position;
2) Reduce the unfunded amount needed to pay future pension obligations for participants in the Wayne County Employees Retirement System,[37]and other OPEB[38] commitments; and
3) Eliminate the County's $52 million structural deficit.

Past and future labor-related costs (item 2, above) were estimated to be $2.2 *billion*. P.A. 436 and its remedial labor measures have been implemented to reverse the kind of labor-related financial carnage experienced by the County.

MERC's interpretation of the interplay between PERA and P.A. 436 "cannot conflict with the plain meaning of the statute."[39] Statutes that address the same subject or share a common purpose are *in para materia* and must be read together as a whole.[40] Statutes enacted by

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[36] *Martin v. Murray*, 309 Mich App 37, 48-49 (2015).

[37] Which, at that time was underfunded by $910.5 *million*, according to the plan actuary.

[38] Estimated in the Consent Agreement to be $1.3 *billion*.

[39] *Complaint of Rovas*, supra.

[40] *Herrick*, supra. at 521, citing *People v. Harper*, 479 Mich 599, 621 (2007).

the Legislature on a later date take precedence over those enacted under an earlier date. When two statutes are *in para materia*, the more specific statute must control over the more general statute.[41] The only plausible interpretation and reading of section 15(1) of PERA with section 8(11) of P.A. 436, is that local governments which cannot be subject to PERA cannot be forced to adjudicate charges to which they are not subject. Section 8(11) of PA 436 and 2(b) of the Consent Agreement do more than limit MERC's remedial power, they remove *all* authority to hear any charges. Any argument that MERC can adjudicate section 15(1) charges but not provide remedial relief is belied by any plain reading of P.A. 436. Moreover, it twists logic to argue that local governments with financial emergencies may avoid financial remedies but, in some *kabuki*-like fashion, are required to defend such actions to no meaningful purpose. As a remedial statute, PA 436 "exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation."[42] Both the text and common sense dictate that neither the County nor the State (or even the union) should be forced to spend time and financial resources when the statute clearly and unambiguously provides that the local government is not subject to sections 15(1) or 10(1)(e) of PERA. Continuation of this ULP charge and any other pending ULP charges violates MCL 141.1548(11).

D. *Capac Community Schools, and Taylor School District* Provide Limited Guidance

The ALJ has requested that the parties address the MERC decision in *Capac Community Schools*. That decision addressed the interplay between PERA and P.A.152 which set limits for healthcare costs for new collective bargaining agreements (CBA's). The ALJ determined that the employer repudiated a section of an otherwise expired CBA in violation of PERA. The ALJ

[41] *Martin*, supra. at 48-49

[42] *Id.* at 48-49

found that the employer's obligations under P.A.152 were not triggered under that statute even though a "FAQ'S" sheet issued by the State Treasurer's office (responsible for administering P.A.152) provided that the employer would face statutory penalties under that act under a fact scenario similar to the one presented in that case. MERC overturned, and in doing so, it held that, while not always bound by Department of Treasury publications, the ALJ erred in that instance by not doing so.

The *Capac* decision's guidance is superficial in that both that case and the present case involve the interplay between PERA and another statute administered by the State Treasurer, and that Treasurer's "publications." In *Capac,* MERC's acceptance of the Treasury Department's publication was prudential and not mandatory. The text of P.A.152 recognized the duty to bargain in that it did not become effective until after CBA expiration. Nothing in the text of P.A.152 expressly provided that a public employer would not be subject to PERA. In the present case, P.A.436 expressly removes the County from all obligations under section 15(1) of PERA. Moreover, the State Treasurer executed a Consent Agreement by which the parties (including the State) contractually agreed that, pursuant to P.A.436, the County would not be subject to 15(1) of PERA from September 20, 2015 through September 30, 2018. Unlike P.A.152, P.A.436 expressly overrides section 15(1) of PERA and removes MERC's jurisdiction from adjudicating such cases.

The *Taylor School District* decision likewise provides no meaningful guidance in the present case. The primary issue was[43] whether a ten-year union security clause in a five-year CBA violated PERA. MERC held that it did, not by the length of the contract but by determining

[43] It dealt with a number of issues that, while important to the parties in that case (e.g. union members standing to object to the length of the union security agreement and adequacy of consideration) those issues are irrelevant to the present case and will not be discussed.

that the respondents discriminated against the charging parties in contravention of the "Right to Work" amendment to PERA. In the present case, there is no contract between 3317 and the County. The "agreement" is the Consent Agreement between the State and the County which is expressly authorized under P.A. 436. The *Taylor* analysis, which on its face dealt with an unusual one-time PERA situation which could not be repeated, cannot be bootstrapped to invalidate a contract between the State and the County authorized in both spirit and in fact by a State statute expressly removing PERA jurisdiction. In *Taylor School District*, the charging party essentially sought to void a contractual provision, between non-State parties because it violated public policy as expressed in the State's Right to Work statute. In the present case, the County is seeking to enforce a contract with the State that is faithful to the public policy expressed by P.A. 436.

E. The County is not subject to section 15(1) of PERA as a matter of contract between the State and the County and these contractual rights cannot be impaired under Mich Const 1963, art 1, sec 10 by invocation of MERC rules or PERA.

Failure to dismiss the present charges raises a constitutional issue with respect to the Consent Agreement. The County's PERA-free status is both a statutory and *contractual* right promised by the State for a defined term. The County submits that any adverse action by the MAHS/MERC would cause an unconstitutional impairment of the County's contractual right not to be subject to section 15(1) of PERA during the defined term in contract.

A contract is "impaired" under Mich Const 1963, art 1, sec 10 ("Contract Clause"), when a law undermines a party's ability to legally enforce that contract and a contractual impairment is typically remedied through invalidation of the impairing law[44]. In the present case, there is

[44] *AFT v. Michigan*, 497 Mich 197, 209 (2015). (J. Markman)

1) A valid contract, the Consent Agreement specifically authorized by P.A. 436, between the State of Michigan and Wayne County;
2) Which expressly provides that the County is not subject to section 15(1) of PERA, a provision specifically authorized by P.A. 436;
3) From September 20, 2015 through September 30, 2018, a term specifically confirmed by the Deputy State Treasurer.

Any decision by this tribunal outside of dismissal on jurisdictional grounds would violate the Contract Clause because it would impair the County's contractual right to be free from PERA-overreach. MERC must address constitutional issues related to its jurisdictional authority to act. The *Christian Bros.* decision at MERC confirms that the Commission has addressed whether exercise of its statutory duties violates the Michigan Constitution in an instance in which such an issue goes to MERC's jurisdictional reach. The Michigan Court of Appeals opinion overturning that MERC decision confirms that MERC's jurisdiction is necessarily limited by the Michigan Constitution and the Court of Appeals will overturn MERC on that basis if it overreaches.

The Michigan Supreme Court has previously criticized MERC when it's PERA-impaired focus missed a significant constitutional issue. MERC sought to administer a union election of Supreme Court employees under PERA without considering whether such jurisdiction conflicted with the separation of powers under the Michigan Constitution. The Court emphasized: "MERC's conclusion focuses on the wrong point. It is not determinative that certain Supreme Court employees may or may not be subject to [PERA]. The point is that MERC is attempting to bring the Supreme Court before its tribunal as a party defendant. That is what is critical."[45]

[45] *Matter of Michigan Employment Relations Commission's Order*, 406 Mich 647, 664 (1979).

What is critical for the present case is that any action short of dismissal for lack of subject matter jurisdiction constitutes an unconstitutional impairment of the County's rights under the Consent Agreement.

F. The statute of limitations bars the remaining charges.

The only remaining charge which arguably comes outside sections 15(1) and 10(1)(e) is the charge that a 3317 member allegedly told at least one other 3317 member that the CEO wanted 3317's counsel fired and that the County was serious in its concessionary proposals. Factual support for this allegation comes in the form of an affidavit, not from the alleged speaker[46], but rather from Daniel Connell, another 3317 member. In paragraphs 3 and 4 of Connell's Ex 3 affidavit, he clearly states that these alleged statements were made in late July, 2015. Those alleged statements, otherwise inadmissible as hearsay pursuant to MRE 801, occurred more than six months before the February 2016 charges were made and are thus beyond the jurisdictional six month statute of limitations contained in MCL 423.216.

V. CONCLUSION

MERC has no jurisdiction to hear and determine the pending ULP charges against the County because P.A. 436 removes the County from PERA jurisdiction until October 1, 2018. Any action by MERC other than dismissal of these pending charges will result in a constitutional impairment of contract and trigger immediate exceptions and appeal by the County.

REQUESTED RELIEF

The Respondent respectfully requests that the Section 15(1) and 10(1)(e) allegations (whether properly identified as such or not) in this and any other charge before this ALJ relating

[46] A 3317 Member, Sgt. Turfe.

to Wayne County and 3317 be dismissed for lack of subject matter jurisdiction pursuant to MCL 141.1548(11), and that the remaining sections 10 and 11 charges be dismissed because they are beyond the jurisdictional statute of limitations pursuant to MCL 423.216.

Respectfully submitted,

/s/ ***Bruce A. Campbell***
Bruce A. Campbell (P37755)
Assistant Corporation Counsel
Office of Wayne County Corporation Counsel
Guardian Bldg., 30th Floor
500 Griswold St
Detroit, MI 48226
(313) 224-8122

CERTIFICATION OF SERVICE

I hereby certify that on November 22, 2016, I served via email the foregoing paper(s) to:

Travis Calderwood @
calderwoodt@michigan.gov

Jim Akhtar @
jimakhtar@att.net

/s/ ***Mark J. Bossuah***
Mark J. Bossuah, Paralegal
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Detroit, MI 48226
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rross@waynecounty.com

Exhibit #2

TRUE COPY

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY,
Respondent-Public Employer,

-and-

AFSCME COUNCIL 25, LOCAL 3317,
Charging Party-Labor Organization.

Case Nos. C14 G-079
C14 G-079A
C16 B-015
C16 K-126

Docket Nos. 14-015819-MERC
15-037169-MERC
16-003534-MERC
16-033168-MERC

_____/

APPEARANCES:

Wayne County Assistant Corporation Counsel, Bruce Campbell, for the Respondent-Public Employer

Jamil Akhtar, for the Charging Party-Labor Organization

INTERIM ORDER ON MOTION FOR SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned cases were assigned to Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

The Unfair Labor Practice Charges and Procedural History:

On July 14, 2014, AFSCME Council 25, Local 3317 ("Charging Party" or the "Union"), filed Case No. C14 G-079 against Wayne County ("Respondent" or "County") alleging that the County had violated Sections 11, 15 and 16 of PERA. The Union states in its charge:

> The Respondent knew, when it presented its Deficit Elimination Plan to the Board of Commissioners for approval on May 13, 2014, that respondent was committing an unfair labor practice, in that it had purposefully placed itself in a position of not being able to bargain in good faith, with the Charging Party, as the Deficit Elimination Plan, which has yet to be approved by the State Treasurer, would automatically require the County to bargain in a fashion which is commonly known as "boulwarism."

Of particular concern to the Union was the County's attempts to negotiate changes to the retirement provisions of the parties collective bargaining agreement that was set to expire on September 30, 2014. Section 38.01 L of that contract stated:

> Upon the termination of this Collective Bargaining Agreement on September 30, 2011, the parties may agree to bargain over retirement related Issues during the next round of contract negotiations. However, all issues concerning retirement, including but not limited to, any and all provisions outlined In Article 38 of this Agreement, covering the period of October 1, 2008 through September 30, 2011, shall not be subject to Act 312 arbitration until October 1, 2020.

On August 4, 2014, Respondent filed its "Motion for Expedited Dismissal Pursuant to R 423.165" at which time it also requested oral argument be held. Oral argument took place before the undersigned on August 19, 2014. Neither party filed post-hearing briefs. On April 2, 2015, I issued an interim order in Case No. C14 G-079; Docket No. 14-015819-MERC, denying Respondent's motion. An evidentiary hearing was scheduled for May 14, 2015.

On May 6, 2015, Charging Party filed a motion seeking to amend its charge in Case No. C14 G-079; Docket No. 14-015819-MERC, to include allegations of regressive bargaining in connection with the actions taken by Respondent on and after April 20, 2015.

On May 11, 2015, a pre-hearing conference was held with the parties to discuss the upcoming hearing in light of Charging Party's motion to amend its charge. During that conference counsel for Charging Party indicated that he would be filing charges on behalf of AFSCME Council 25, Locals 25, 101, 409, 1659, 1862, 2057 and 2926 that would mirror the allegations contained in the proposed amended charge filed in Case No. C14 G-079; said Charge was filed on May 12, 2015, and docketed as Case No. C15 E-063; Docket No. 15-035160-MERC.

During the evidentiary hearing held on May 14, 2015, for Case No. C14 G-079, I directed that the proposed amended charges filed by the Union on May 6, 2015, be accepted, bifurcated and consolidated with the charges filed on behalf of the numerous other AFSCME Locals. The proposed amended charge was docketed as Case No. C14 G-079A; Docket No. 15-037169-MERC.

On June 23, 2015, Respondent filed a motion seeking summary dismissal of the consolidated charges. Charging Party filed its response on July 14, 2015. Both parties requested oral argument.

On July 21, 2015, the Wayne County Financial Review Team issued a report in which it concluded that a "financial emergency" existed within the County pursuant to the Local Financial Stability and Choice Act, 2012 PA 436 (PA 436).

On August 21, 2015, a Consent Agreement, between the County and the State Treasurer, pursuant to PA 436, became effective. Section 2(b) of the Consent Agreement stated:

> Consistent with section 8(11) of Act 436, beginning 30 days after the effective date of this agreement the County is not subject to section 15(1) of [PERA], for the remaining term of this agreement.

Section 2(c) of the agreement provided:

> Beginning 30 days after the effective date of this agreement, if a collective bargaining agreement has expired, the County Executive may exercise the powers prescribed for emergency managers under section 12(1)(ee) of Act 436 to impose by order matters relating to wages, hours, and other terms and conditions of employment, whether economic or noneconomic, for County employees previously covered by the expired collective bargaining agreement. Matters imposed under this section 2(c) will remain in effect for those employees until a new collective bargaining agreement for the employees takes effect under 1947 PA 336, as amended, MCL 423.201 to MCL 423.217, or other applicable law. The authority described in this section 2(c) is in addition to the powers retained and granted under sections 1 and 2(a).

Section 10, entitled "Term" of the agreement stated:

> This agreement is effective beginning on the effective date under section 20 and remains effective until the Release Date under section 11(a) or an uncured material breach is declared and not cured, except that sections 2(b) to 2(f) and 5, and the requirement to adopt and implement a two-year budget under section 11 survive the Release Date under section 11(a) and continue in effect for the remaining term of this agreement, which expires at the end of the last County fiscal year after the Release Date covered by the two-year budget adopted under section 11.

Section 11(a), entitled "Release" states in part:

> The County is released from this agreement and the requirements of section 8 of Act 436 upon written notification from the State Treasurer to the County Executive and clerk of the County Commission that the County has complied with this agreement (the "Release Date"). Consistent with section 21(1) of Act 436, the State Treasurer shall require the County Commission and the County Executive, and both are hereby jointly authorized, to exercise the powers prescribed for emergency managers under section 21(2) of Act 436 to adopt and implement using Charter procedures a two-year budget for the County, including all contractual and employment agreements, effective beginning on the first day of a fiscal year beginning after the Release Date. The County is not required to adopt a two-year budget before the Release Date.

At the time that Section 2(b) of the Consent Agreement became effective, September 20, 2015, Local 3317 was the only bargaining unit within the County left without a executed collective bargaining agreement. As such, on September 21, 2015, the County's Employment Terms (CET) were imposed on Local 3317.

Article 40 of the CET set forth the applicable duration for the terms and stated:

> These County Employment Terms shall be effective September 21, 2015, and shall remain in full force until modified by the Chief Executive Officer of Wayne County, acting under Public Act 426 of 2012, MCL §§ 141.1541 et seq., and the Consent Agreement between Wayne County and the State Treasurer, effective, August 21, 2015, or replaced by a successor bargaining agreement.

The CET made changes to the employment terms that had been set forth in the parties' agreement that had expired on September 30, 2014, including but not limited to the pension and retirement provisions.

On December 17, 2015, the Parties appeared before the undersigned for oral argument over Respondent's motion seeking dismissal of Case Nos. C14 G-079A and C15 E-063. At the onset of that hearing, Charging Party withdrew Case No. C15 E-063. Following extensive arguments made by both parties on the record and with consideration given to the pleadings and filings submitted by the parties, I concluded that summary dismissal of Case No. C14 G-079A was not appropriate and denied Respondent's motion from the bench. A written order to that effect was issued on February 17, 2016.

Post hearing briefs in Case No C14 G-079 were filed by the parties the first week of February 2016. A Decision and Recommended Order in that case has not been issued as of the date of this Interim Order nor has an evidentiary hearing been held in Case No. C14 G-079A.

Also on February 17, 2016, Local 3317, filed an unfair labor practice charge, Case No. C16 B-015, in which the Union alleged that the County had failed to engage in good faith bargaining from August 21, 2015, through September 20, 2015, the later date being the date in which the County's duty to bargain under Section 15 of PERA was suspended by nature of the Consent Agreement. The Union also alleged that the County, and more specifically Wayne County CEO Warren Evans, had violated Sections 10 and 11 of PERA, by attempting to undermine the Union's attorney by refusing to meet with the attorney and communicating to various members of the unit that they should fire said attorney. Charging Party requested as part of the remedy that the County be ordered to withdraw its last bargaining proposals as well as an order issued to void the working conditions imposed on by the County.

Several telephone conferences were held with the parties during the first three months of 2016 in which the status of the County's finances and Consent Agreement were discussed in connection to the three then pending cases. Ultimately it was my decision to adjourn Case Nos. C14 G-079A and C16 B-015 without date because of the suspension of the County's duty to bargain under Section 15(1) of PERA by way of the Consent Agreement. I also chose to hold off issuing any decision in Case No. 14 G-079 under the premise that any relief that could be awarded to Local 3317, if it were to prevail on some or all of its allegations, would be hollow in nature, i.e., any relief on bargaining charge would not be enforceable while the County's duty to bargain was suspended.

On October 18, 2016, the State Treasurer sent a letter to the County which stated in part:

> I am in receipt of your letter dated October 6, 2016, in which you certified that Wayne County is eligible for release from the Consent Agreement entered into on August 21, 2015. I am pleased to agree with your certification. Specifically, I find that the county has satisfied the Consent Agreement terms found in Subsections 11(a)(1)-(3) of the Agreement. As a result of this determination, the County has successfully completed and is hereby released from its Consent Agreement.

On October 20, 2016, counsel for the Union sent my office an email with the October 18, 2016, letter from the State Treasurer attached and requested a conference call to discuss scheduling Case Nos. C14-G-079A and C16 B-015 for hearing. During an October 25, 2016, conference call, the County objected to scheduling consolidated cases, for hearing and asserted that, by the terms of the Consent Agreement, it was still exempt from Section 15(1) of PERA, the Treasurer's October 18, 2016, letter notwithstanding. The County further claimed that, due to the timing of its budget adoption and the request made to the Treasurer regarding the Consent Agreement, that it would not be subject to Section 15(1) until October 1, 2019. No decision was made at that time on how to proceed.

On October 27, 2016, another telephone conference call was held at which time I directed both parties to provide written position statements as to the issue of whether the County was in fact still exempt from Section 15(1) of PERA.

On November 11, 2016, the County provided, by email, a copy of a November 10, 2016, letter from the Deputy State Treasurer, which stated in the relevant part:

> I am in receipt of your written request asking for clarification of the Consent Agreement in regard to the two year budget requirement. In the letter granting release from the agreement, dated October 18, 2016, the Department of Treasury waived the requirement that amendments to the two year budget be approved by the Department.
>
> The Department did not waive the requirement for Wayne County to adopt a two year budget. As required by the Consent Agreement, the County must adopt a two year budget beginning the first fiscal year after the release. The release date of the County from the Consent Agreement occurred 18 days after the start of the County's current fiscal year. However, for the avoidance of doubt, the two year budget contemplated by the department at the time of release was for fiscal years 2017 and 2018.

Accordingly, the County revised its position such that its duty to bargain under Section 15(1) would be reinstated October 1, 2018, as opposed to October 1, 2019.

On November 22, 2016, the County filed a Position Statement and Motion to Dismiss in Case Nos. C14-G-079A and C16 B-015. The Union filed its Position Statement with my office on November 23, 2016. Emails were exchanged with the parties regarding the timeline in which the Union was to respond to the County's motion.

On November 28, 2016, Local 3317 filed its last and most recent charge against the County, Case No C16 K-126. In this charge, the Union alleges, as of October 18, 2016, the County has been released from the Consent Agreement and therefor subject to Section 15(1) of PERA and that despite this the County has refused to bargain with Charging Party. The Union also alleges that the County imposed modified employment terms on September 23, 2016, which it claims are "worse than the comparable wages, hours and other terms and conditions of employment of County unionized employees." Lastly, Charging Party claims that it is the only union in the County that has had its dues check-off terminated and that said termination was done in retaliation.

On December 21, 2016, I received notice from the County that it wished its motion to dismiss filed in Case Nos. 14 G-079A and C16 B-015 to apply to Case No. C16 K-126 as well.

On January 13, 2017, I received Local 3317's response to the County's motion. Oral argument was heard on January 20, 2017, in Detroit, Michigan.

Discussion and Conclusions of Law:

At the outset, and to ensure that there is no confusion as to the status of the four pending unfair labor practice charges, Case Nos. C14 G-079A, C16 B-015, and C16 K-126, are consolidated and shall be considered together for purposes of the County's motion seeking dismissal. Case No. C14 G-079, while not explicitly included in the County's motion, the underlying arguments as set forth by the County and as explained below, could have a dispositive effect thereto.

Once filed an unfair labor practice charge levied by a charging party against a respondent can follow many different paths towards ultimate disposition with the Commission. Typically, that path begins with the assignment of the charge to an administrative law judge (ALJ) as designated by the Commission. Following that assignment, there is great latitude, under Rule 172 of the Commission's General Rule, R 423.172, 2002 AACS; 2014 AACS, given to the ALJ on how to proceed with the charge. Said powers include, but are not limited to the power to, hold pre-trial conferences for any number of enumerated reasons; rule on pre-hearing motions, take evidence and testimony; regulate the course of a hearing; take official notice of facts or other items of public knowledge; and, to take any other action necessary and authorized by the Commission's rules. To that end, the undersigned has exercised virtually all of the powers provided to me under Rule 172 in some fashion or another (and possibly exercised powers the parties might take issue with, but which I contend are allowed under the catch-all provision). To date there has been no less than fourteen separate pre-hearing conferences between myself and the parties over the various charges; three separate oral arguments and one day of actual hearing for Case No. C14 G-079.

The various bargaining allegations made against the County occupy three separate timeframes. Allegations levied against the County in C14 G-079 and C14 G-079A, involve conduct that without question occurred prior to the September 20, 2015, date that the Consent Agreement's Section 15(1) exemption became operative.

Case No. C16 B-015's bargaining related allegations involve the County's conduct during the period of time between the August 21, 2015, execution of the Consent Agreement and September 20, 2015, the date the County was no longer subject to Section 15(1). However, this charge was not filed until after September 20, 2015. Lastly, the allegations that the County's most recent refusal to bargain in Case No. C16 K-126, arises either after the County is released from the Consent Agreement and therefore subject to the duty to bargain again, or arises while the exemption from Section 15(1) remains valid, depending on the positions of the parties.

The heart of the County's motion is that the exemption from its duty of bargain under Section 15(1) as provided by the Consent Agreement disavows the Commission from subject matter jurisdiction over claims that arise from an alleged violation of Section 15(1). As such, the County argues that the remedial nature of the statute that has afforded it the exemption from Section 15(1), PA 436, requires that all pending charges alleging a violation of Section 15(1) must be dismissed regardless of when the alleged violation occurred, i.e., pre or post Consent Agreement. This is because, per the County, allowing the Commission to adjudicate Section 15(1) charges but not provide remedial relief is contrary to the purposes of PA 436.The County also asserts that its continued exemption from Section 15(1) of PERA is also a "contractual right promised by the state for a defined term." With respect to the contractual issue, it argues that any exercise of jurisdiction by the Commission or this Administrative Law Judge predicated on a violation of Section 15(1) of PERA would be an unlawful impairment of the County's contractual rights as guaranteed under Article 1, Section 10, under the Michigan Constitution of 1963. Lastly, the County argues that the only portion of the various charges levied against it that do not implicate Section 15(1), of which the Commission does not possess jurisdiction to consider – that the County's CEO wanted the Union to fired its attorney – is barred by PERA's six-month statute of limitations, since those allegations, as set forth in an affidavit, were claimed to have occurred in late July of 2015, while the charge wasn't filed until February 17, 2016.[1] Timeliness aside, the County also identifies potential hearsay and other admissibility issues relative to claims made in the charge.

With respect to the duty to bargain or lack thereof, the County argues that its exemption by order of the Consent Agreement does not expire until October 1, 2018.[2] The County's assertion that it remains exempt until October 1, 2018, relies upon the language agreed to between itself and the State Treasurer contained in Section 10 of the Consent Agreement. In other words, Section 10 of the Consent Agreement creates a sort of staggered release date, such that while it may have been "released" from the Consent Agreement by way of the October 18, 2016, letter from the State Treasurer, Section 10 of the Agreement provides that several provisions continue to remain in effect, one of which is the County's exemption from the duty to bargain under Section 15(1) of PERA.

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[1] Attached to Case No. C16 B-015, is the affidavit of Local 3317 unit member and bargaining team member Daniel Connell. Connell's affidavit states that in late July of 2015, another unit member Sergeant Turfe, approached him along with other unit members and relayed comments attributed to CEO Evans.

[2] As stated above, the County's initial position was that language set forth in Section 10, providing that it was exempt from Section 15(1) of PERA until October 1, 2019 – the first day after the expiration of a two-year budget entered into after the release date from the Consent Agreement. However, following the State Deputy Treasurer's letter of November 11, 2016, interpreting the requirements of a two-year budget under the Consent Agreement, the County revised its positon such that Section 15(1) would become effective against it on October 1, 2018.

Accordingly, the first issue to consider for purposes of this interim order is to determine the status of the County's exemption from Section 15(1) of PERA per Section 2(b) of the Consent Agreement. Resolution of the issues requires the interpretation of Section 8 of PA 436 as it relates to PERA. Section 8 of PA 436, sets forth the various mechanics and requirements that can be made part of a consent agreement. Subsection 1 of that section provides the authority by which the County's CEO negotiated and entered into the Consent Agreement with the State Treasurer. Subsection 10, allows the State Treasurer to grant additional powers typically reserved for emergency managers as part of the consent agreement – which were granted to the County Commission and CEO under Section 1(c) of the Consent Agreement. Subsection 11 provides the authority by which the State Treasurer, in Section 2(b) of the Consent Agreement, exempted the County from its bargaining duty under Section 15(1) of PERA. That subsection states:

> Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this act, that local government is not subject to section 15(1) of 1947 PA 336, MCL 423.215, for the remaining term of the consent agreement.

In addition to the above situation with consent agreements, PA 436, in Section 27(3), also provides for the PERA Section 15(1) exemption while a local government is in receivership. That Section provides:

> A local government placed in receivership under this act is not subject to section 15(1) of 1947 PA 336, MCL 423.215, for a period of 5 years from the date the local government is placed in receivership or until the time the receivership is terminated, whichever occurs first.

When attempting to interpret statutory language, the primary goal is to discern and give effect to the legislative intent that may reasonably be inferred from the language of the statute. *Neal v Wilkes*, 470 Mich 661, 665, 685 NW2d 648 (2004). In determining legislative intent, courts must give the words of the statute their common and ordinary meaning. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146, 644 NW2d 715 (2002). Moreover, a court must "give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.* Additionally, when enacting legislation, the Legislature is presumed to have knowledge of existing laws and to have considered the effect of new laws on the existing laws. *Walen v Dep 't of Corrections*, 443 Mich 240, 248, 505 NW2d 519 (1993).

The Commission, in various cases involving the application of Section 8(11) or Section 27(3), has upheld the validity of the exemption and thereby refused to find that an unfair labor practice occurred in violation of Section 15(1) of PERA. See *City of Detroit (Police Department)*, 29 MPER 60 (2016) (no exceptions) (Employer did not violate Section 15(1) when it unilaterally transferred bargaining unit work to members of another bargaining unit because at the time of the transfer the City was in receivership under PA 436); *City of Detroit*, 29 MPER 59 (2016) (no exceptions) (Allegations that the City violated its duty to bargain under 15(1) of PERA, including its duty to provide information relevant to collective bargaining was dismissed

because at the time of the allegations the City was in receivership under PA 436); *City of Inkster*, 29 MPER 29 (2015) (no exceptions) (Allegations that the City's refusal to bargain, despite its initial request to the union to do so, were dismissed because at the time of the allegations the City was under a consent agreement exempting it from the requirements of Section 15(1) of PERA); See Also *City of Detroit*, 27 MPER 6 (2013) (Commission granted the City's motion to dismiss pending Act 312 arbitrations on the grounds that while the City was in receivership under PA 436, it has no obligation to participate in Act 312 arbitration and is not required to do so).

Additionally, our Commission has already issued a ruling with respect to the validity of the Consent Agreement at issue in these proceedings and its effect on the County's duty to bargain, or lack thereof. Following the rationale of *City of Detroit*, 27 MPER 6 (2013), the Commission in *Wayne County*, 29 MPER 26 (2015), granted the County's motion seeking dismissal of an Act 312 Petition on the grounds that the County was subject to the Consent Agreement. In so holding, the Commission rejected the Union's argument that the arbitration should move forward since the petition as it stood at the time of the City's motion, had been activated prior to the execution of the Consent Agreement and because an arbitration panel had already been selected. The Commission stated:

> In conclusion, we find that the Employers in this matter are subject to a consent agreement under Act 436 that suspended the County' s duty to bargain as of September 20, 2015. The Employers have expressed an unwillingness to bargain or participate in Act 312 arbitration in light of Act 436. As such, as of September 20, 2015, the Employers cannot be required to participate in Act 312 arbitration. Accordingly, the Act 312 arbitration in the case before us must be dismissed as of that date.

It is clear, through the Commission's actions as set forth in the above proceedings and a reading of the statute at issue that beginning on September 20, 2015, the County was relieved of its duty to bargain under Section 15(1) of PERA by nature of Section 2(b) of the Consent Agreement and Section 8(11) of PA 436. However, the question remains whether the Treasurer under Section 8(11) of PA 436, can determine to extend that exemption past the release date of the Consent Agreement, and as explained below, it is the opinion of the undersigned that he cannot. Accordingly it is my holding that the County was no longer protected by Section 8(11) of PA 436 as of October 18, 2016, the date when the State Treasurer released it from the Consent Agreement

The County argues that PA 436 and PERA are in *pari materi*, and as such the more specific statute, PA 436, must control. Furthermore, as correctly noted by the County, under *Martin v Murray*, 309 Mich App 37 (2015), the courts have already deemed PA 436 a remedial statute. The Court stated in *Martin* at 48-49:

> As a remedial statute, 2012 PA 436 exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation. It is axiomatic that "when two statutes appear to control a particular situation, the more recent and more specific statute applies." [internal

> citations omitted.] 2012 PA 436 is both more specific and more recently enacted than the Revised School Code and the Michigan Election Law. The provisions of 2012 PA 436 therefore control over MCL 168.311(1) and MCL 380.411a(6) when a school district is in receivership.

However, in addition to the above tenets of statutory interpretation and interplay, the undersigned must also remain cognizant to the supremacy of PERA in matters involving the public sector. Our Supreme Court has consistently held that PERA is the dominant law regulating public employee labor relations. See *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 629 (1975). In *Rockwell*, the Court held that "[t]he supremacy of the provisions of the PERA is predicated on the constitution (Const 1963, art 4, s 48) and the apparent legislative intent that the PERA be the governing law for public employee labor relations." *Rockwell* at 630. In *Detroit Bd of Ed v Parks*, 98 Mich App 22, 36 (1980), the Court of Appeals concluded that because PERA is the dominant law regulating public employee labor relations it "therefore must supersede any other law in conflict with it." See also, *Local 1383 Int'l Ass'n of Fire Fighters v City of Warren*, 411 Mich 642, 648 (1981).

Working through the principles as set forth above, it is clear to the undersigned that under the plain language of Section 8(11) of PA 436, the State Treasurer does possess some power as it relates to the timing that which a local government may be exempted from the requirements of Section15(1) of PERA. It is equally clear that with respect to the issue at hand, whether the County's exemption can survive the release from the Consent Agreement by decree or agreement with the State Treasurer, PERA and PA 436 are not in conflict and that PERA controls.[3] While the State Treasurer does possess power with respect to exempting the County from its duty under Section 15(1) of PERA, that power is limited to a determination of when the exemption becomes effective, if ever, i.e., the State Treasurer could determine that the exemption should begin immediately, in fifteen days, or at some other time trigger either by time or event. Even to accept that PA 436 and PERA are in fact *pari materia*, the outcome remains the same. PA 436, explicitly and specifically sets forth that the State Treasurer can determine when the exemption becomes effective – PA 436 also explicitly and specifically sets forth that the exemption lasts only until the local government is released from the consent agreement.

Additionally, in respect to the County's argument regarding its contractual rights, recently, the Court of Appeals, in an unpublished decision, *Traverse Bay ISD v Traverse Bay ISD MEA, NEA,* Docket No. 330037 (January 19, 2017), citied the longstanding principle that public employers and public employee labor organizations could create enforceable agreements that survived the expiration of their collective bargaining agreements. The Court stated:

> First, this Court has previously held that the parties to a collective bargaining agreement may agree to contractual obligations that extend beyond the expiration

[3] The present situation regarding whether PA 436 and PERA conflict is distinct from the situation in *Murray*, supra. In that case, the Court held that PA 436 explicitly and unequivocally transferred the decision making power from the chief executive or governing body to an emergency manager. Since the Revised School Code and Michigan Election Law both vested the power to appoint vacant school board seats to the school board, by operation of PA 436, that power was transferred to the emergency manager. Here, PA 436 does not conflict with PERA nor do the two statutes control the same situation – PA 436 merely suspends a portion of PERA for a finite period of time.

> of the agreement. See *Ottawa Co v Jaklinski*, 423 Mich 1, 24-25; 377 NW2d 668 (1985) (opinion by WILLIAMS, C.J.) (noting that the parties to a collective bargaining agreement "may agree to extend beyond contract expiration any substantive or procedural rights"). Further, MERC has long held that such agreements remain enforceable even after the expiration of collective bargaining agreement. *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528. See also *John Wiley & Sons, Inc v Livingston*, 376 US 543, 555; 84 S Ct 909; 11 L ed 2d 898 (1964) (finding "no reason why parties could not if they so choose agree to the accrual of rights during the term of an agreement and their realization after the agreement expired").

The proceeding notwithstanding, the fact remains that in contractual situations valid under *Ottawa Co,* such agreements are made between a public employer and the bargaining representative of public employees, both of which are subject to PERA and defined under Section 1 of the Act. Here, the contractual situation does not involve two parties subject to PERA, rather it involves one PERA-subject actor, the County, and a non-PERA actor, the State Treasurer. As such, I find no support for the argument that a contract between a PERA-subject actor and a third-party can serve as a valid mechanism to deprive public employees of their rights as guaranteed and protected under PERA.

Next addressed is the County's argument that any exercise of the jurisdiction by the Commission in adjudicating an unfair labor practice charge involving an alleged violation of Section 15(1) of PERA is improper during the pendency of a consent agreement that contains a PA 436, Section 8(11) exemption clause and that such charge(s) should be dismissed. The Commission's decisions in dismissing the pending Act 312 arbitrations in *City of Detroit*, 27 MPER 6 (2013), and *Wayne County*, 29 MPER 26 (2015), despite those proceedings being initiated prior to the City and County's exemption from Section 15(1) of PERA, was based on the theory that a duty cannot be imposed where the local government is explicitly released from said duty. Neither of the preceding Commission's actions, on their face, can be read to hold that this Commission loses its jurisdiction to adjudicate unfair labor practice charges brought per Section 15(1) where the action complained of occurred while the Respondent was in fact subject to Section 15(1). I understand the County's position that forcing it to adjudicate a Section 15(1) claim during a time that is exempt from Section 15(1) is burdensome, especially since any remedy ordered could not be enforced during the exempt status. It is under this premise that I have held these present proceedings in abeyance, i.e., any relief available to Charging Party stemming from alleged violations of Section 15(1), would involve the issuance of a cease and desist order, an order to bargaining in good faith, and possibly the returning to the status quo or rescission of bargaining proposals in the extreme. Nothing within PA 436, or the above two Act 312 proceedings can be read to stand for the premise that past transgressions are immediately unassailable because of a consent agreement. Such an outcome, similar to the "automatic stay" and "discharge" mechanisms provided for under the U.S. Bankruptcy Code, Title 11, 11 U.S. Code §§ 362 and 944, are invariably contrary to the purpose of PERA, and as such could only be provided for with specific statutory language, which PA 436 clearly is devoid of as it relates to consent agreements.

Lastly, addressed are the County's claims that the remaining portions of the charge that do not implicate Section 15(1), are barred by the statute of limitations or otherwise are lacking support via admissible evidence. Those charges, contained in Case No. C16 B-015, alleged that the County, and more specifically Wayne County CEO Warren Evans, had violated Sections 10 and 11 of PERA, by attempting to undermine the Union's attorney by refusing to meet with the attorney and communicating to various members of the unit that they should fire said attorney. It is true that a portion of the charge's factual support is comprised of the attestation by one unit member of statements attributed to another unit member, and that the subject of that attestation are comments made to the second unit member and attributed to the County CEO. The former being hearsay, the latter being a party admission against interest, yet nonetheless contained within hearsay. Furthering compounding the issues is that the statements allegedly made by CEO and repeated by the unit member both occurred outside PERA's six-month statute of limitations. However, the Union's allegations are also supported by an email sent by County Commissioner Diane Webb on November 30, 2015. Whether the one unit member's conversation with the CEO, or the recounting of that conversation is enough to establish that the Charging Party knew or should have known at that time of the basis for what it is now later alleging is a question of fact, accordingly dismissal based on timeliness is improper at this time. Additionally, issues regarding admissibility of evidence or testimony will be addressed at the time said evidence or testimony is offered at hearing.

Accordingly, Respondent's motion seeking dismissal of the above captioned unfair labor practice charges is hereby **DENIED**. A decision and recommended order in Case No. C14 G-079 will be issued within short order. Case Nos. C14 G-079A, C16 B-015 and C16 K-126 are consolidated and are set for hearing as indicated the attached Notice of Hearing.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 3, 2017

Exhibit #3

KeyCite Yellow Flag - Negative Treatment
Appeal Granted by Shelby Township v. Command Officers Association of Michigan, Mich., February 3, 2017

2015 WL 9268183
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

SHELBY TOWNSHIP, Respondent–Appellant,
v.
COMMAND OFFICERS ASSOCIATION OF MICHIGAN, Charging Party–Appellee.

Docket No. 323491.
|
Dec. 15, 2015.

Before: SHAPIRO, P.J., and O'CONNELL and WILDER, JJ.

Opinion

PER CURIAM.

*1 Respondent, Shelby Township (the Township), appeals as of right the decision of the Michigan Employment Relations Commission (MERC), which concluded that the Township failed to bargain over a mandatory subject of bargaining and applied an incorrect rate for health insurance to members of the charging party, Command Officers Association of Michigan (the Union). We affirm.

I. LEGAL AND FACTUAL BACKGROUND

The Publicly Funded Health Insurance Contribution Act, MCL 15.561 *et seq.*, limits how much public employers may pay toward healthcare costs for employee medical benefit plans. There are two alternatives available to the public employer: the "hard cap" option, MCL 15.563, gives employers the option to pay a specific amount per employee, while the "percentage" option, MCL

15.564, gives employers the option to pay not more than 80% of total healthcare costs for all employees and elected public officials. A medical benefit plan excludes "benefits provided to individuals retired from a public employer...." MCL 15.562(e).

MCL 423.215b(1) provides that after a collective bargaining agreement expires, "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" and that the employees shall pay any increased costs of maintaining their benefits. The cost increase "shall not cause the total employee costs for those benefits to exceed the amount of the employee's share" under the Act. MCL 423.215b(4)(b).

The Union represents supervising law enforcement officers in the Township. The parties' collective bargaining agreement expired on December 31, 2010. When the contract expired, the Union's members paid flat annual rates. In November 2011, the Township adopted the "percentage" option for only the Union's members and dispatchers—it decided to apply the "hard cap" option to non-union employees and other bargaining units.

The Union demanded to bargain about the calculation method and total amount of employee contributions, but the Township denied that it had made any decision regarding the amounts of premium sharing. On December 6, 2011, the Township voted to adopt an 80/20 premium sharing plan, and the Union renewed its demand to bargain. On January 11, 2012, the Township advised the Union that it would not bargain about the percentage sharing plan.

The Township's premium sharing plan became effective and increased the members' rates on January 1, 2012, even though the employees' plan did not renew until February 1, 2012. In January 2012, the Union's members were required to pay both their 20% share and a cost increase for that month. Additionally, the members' insurance rates were based on bundled rates, which included the insurance costs of retirees, instead of unbundled rates, which did not. John Vance, a plan analyst for the Township's insurance provider, testified that the insurance provider offered both bundled and unbundled rates to the Township in mid-January 2012.

***2** Following a hearing before a magistrate, MERC ruled that the Township did not violate its duty to bargain by unilaterally choosing the "percentage" option instead of the "hard cap" option. However, MERC concluded that the Township had a duty to bargain about the calculation of the Union members' premium shares. MERC ruled that the Township improperly relied on bundled rates to calculate the employees' premiums because MCL 15.562(e) expressly excluded benefits to retirees from medical benefit plans. MERC concluded that the Township could not lawfully require the Union's members to pay more than 20% of the unbundled rate. It ordered the Township to recalculate the employees' premiums as of February 1, 2012, and refund any overpayments, as well as the increased cost in January 2012.

II. STANDARDS OF REVIEW

This Court reviews MERC decisions to determine whether the decision is authorized by law and MERC's findings are supported by competent, material, and substantive evidence. Const 1963, art 6, § 28; *Grandville Muni Executive Ass'n v. Grandville,* 453 Mich. 428, 436; 553 NW2d 917 (1996). Substantial evidence is evidence that a reasonable person would accept to support a conclusion. *In re Payne,* 444 Mich. 679, 692; 514 NW2d 121 (1994) (opinion by BOYLE, J .). We review de novo MERC's legal decisions. *Branch Co Bd of Comm'rs v. UAW,* 260 Mich.App 189, 192–193; 677 NW2d 333 (2003). MERC's legal conclusions are not binding on this Court, but we afford them respectful consideration. See *In re Complaint of Rovas Against SBC Michigan,* 482 Mich. 90, 97, 103; 754 NW2d 259 (2008).

III. RATES AS A MANDATORY SUBJECT OF BARGAINING

The Township contends that MERC erred when it concluded that the percentage allocation of premium contributions is a mandatory subject of bargaining. We disagree.

The Public Employee Relations Act (PERA), MCL 423.201 *et seq,* controls in any conflict with another statute. *Van Buren Co Ed Ass'n v. Decatur Pub Schs,* 309 Mich.App 630, 643; —— NW2d —— (2015). PERA requires public employees to bargain about wages and conditions of employment. MCL 423.215(1). Health insurance benefits are a mandatory subject of bargaining. *Ranta v. Eaton Rapids Pub Schs Bd of Ed,* 271 Mich.App 261, 270; 721 NW2d 806 (2006). A public employer does not have a duty to bargain about its choice between the "hard cap" and "percentage" options for employee medical plan contributions. *Van Buren Co Ed Ass'n,* 309 Mich.App at 643. But a public employer must bargain about the amount that specific employee groups will pay toward the employees' portion of the contribution. *Id.* at 645–646.

In this case, MERC ruled that the Township did not have any duty to bargain about its choice of the "percentage" option over the "hard cap" option, but it concluded that the Township did have the duty to bargain over the percentages that the employee groups would contribute. MERC's decision is consistent with this Court's interpretation of the same statutory language in *Van Buren Co Ed Ass'n.* We conclude that MERC did not err by concluding that this was a mandatory subject of bargaining.

IV. BUNDLED INSURANCE RATES

***3** The Township also contends that MERC erred when it concluded that it had improperly

calculated the employees' premiums on the basis of bundled rates that included retirees' insurance costs. According to the Township, it properly relied on a Department of Treasury document that approved of bundled rates. We disagree.

First, even presuming that the Department of Treasury's "frequently asked questions" document applies to the percentage option,[1] it does not supersede MERC's interpretation. PERA is a "highly specialized and politically sensitive field of law." *Kent Co Deputy Sheriffs' Ass'n v. Kent Co Sheriff,* 238 Mich.App 310, 313; 605 NW2d 363 (1999). MERC has sole jurisdiction to resolve issues involving unfair labor practices. *Id.* MCL 423.215b is part of PERA, which MERC is charged with enforcing. We conclude that MERC was not bound by the Department of Treasury's memorandum.

1 This document concerned only the "hard cap" option and did not mention the "percentage" option that the Township chose in this case.

Second, we conclude that MERC did not err as a matter of law when it determined that the Township could not use a rate for its employees' premiums that included benefits for retired employees. The definition of "medical benefit plan" specifically *excludes* benefits to retired employees. MCL 15.562(e). The bundled rate used in this case included retirees' costs. The unbundled rate was available to the Township in mid-January, before the employees' insurance plan renewed on February 1, 2012. The Township's difficulty in complying with the statute does not render the statute unreasonable or allow this Court to avoid enforcing its language as written. See *Johnson v. Recca,* 492 Mich. 169, 187; 821 NW2d 520 (2012).

Finally, the Township argues that MERC improperly ordered it to unilaterally recalculate its premiums and reimburse the Union's members for any healthcare overcharges. Other than restating its previous arguments, the Township provides no authority for the proposition that MERC may not order recalculation and reimbursement as a remedy. We conclude that the Township has abandoned this issue. See *VanderWerp v. Plainfield Charter Twp,* 278 Mich.App 624, 633; 752 NW2d 479 (2008). Additionally, we note that MERC may impose any remedy that would make affected employees whole. See *Pontiac Fire Fighters Union Local 376 v. Pontiac,* 482 Mich. 1, 10; 753 NW2d 595 (2008).

We affirm.

All Citations

Not Reported in N.W.2d, 2015 WL 9268183

End of Document

Order

Michigan Supreme Court
Lansing, Michigan

November 1, 2017

153074

SHELBY TOWNSHIP,
Respondent-Appellant,

v

SC: 153074
COA: 323491
MERC: 12-000067

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Charging Party-Appellee.

_____/

On order of the Court, leave to appeal having been granted and the Court having considered the briefs and oral arguments of the parties, the judgment of the Court of Appeals is AFFIRMED by equal division of the Court.

WILDER, J., did not participate because he was on the Court of Appeals panel.

d1030

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 2017

Clerk

753 N.W.2d 595 (2008)

PONTIAC FIRE FIGHTERS UNION LOCAL 376, Plaintiff-Appellee,

v.

CITY OF PONTIAC, Defendant-Appellant.

Docket No. 132916. Calendar No. 6.

Supreme Court of Michigan.

Argued November 7, 2007.
Decided July 23, 2008.

596 *596 Gregory, Moore, Jeakle, Heinen & Brooks, P.C. (by Gordon A. Gregory and Emilie D. Rothgery), Detroit, for the Pontiac Fire Fighters Union Local 376.

Keller Thoma, P.C. (by Bruce M. Bagdady and Jonathon A. Rabin), Detroit, for the city of Pontiac.

Dykema Gossett, PLLC (by John A. Entenman, Melvin J. Muskovitz, and F. Arthur Jones II), Ann Arbor, for the Michigan Municipal League and the Michigan Association of Counties, amici curiae.

Woodley & McGillivary (by Thomas A. Woodley and Bryan G. Polisuk), Washington, DC, for the International Association of Fire Fighters and the Michigan Professional Fire Fighters Union, amici curiae.

Sachs Waldman, Professional Corporation (by Mary Ellen Gurewitz), Detroit, for the Michigan State AFL-CIO, amicus curiae.

597 *597 YOUNG, J.

The issue in this case is whether the circuit court abused its discretion when it issued a preliminary injunction preventing defendant city of Pontiac from implementing its plan to reduce a budget shortfall by laying off members of plaintiff Pontiac Fire Fighters Union Local 376. We hold that the circuit court abused its discretion. Plaintiff failed to meet its burden of establishing that irreparable harm would result if the injunction did not issue, and even supposing plaintiff satisfied its initial burden, it failed to carry its burden in light of defendant's contrary proffered evidence. Accordingly, we reverse the Court of Appeals and vacate the circuit court order granting the preliminary injunction.

FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant are parties to a collective bargaining agreement (CBA) that was in effect from June 1, 2002, to June 30, 2004. Although the parties did not agree to a new CBA when that agreement expired, the existing agreement continued to govern the parties' relationship after June 30, 2004, because under its own terms the agreement was automatically extended until a new contract was negotiated or ordered.[1]

In 2005 and 2006, defendant faced serious budget shortfalls that it sought to address in part by laying off 28 firefighters. Plaintiff maintained that the layoff plan and the manner in which defendant intended to implement it violated the terms of the CBA[2] and constituted an unfair labor practice.

On June 16, 2006, plaintiff filed a verified complaint in the Oakland Circuit Court seeking a preliminary injunction against defendant's proposed layoffs pending the resolution of an unfair labor practice charge, collective bargaining, or interest arbitration.[3] Several days earlier, plaintiff had filed an unfair labor practice charge against defendant with the Michigan Employment Relations Commission (MERC). The verified complaint alleged that the proposed layoffs would necessitate a dramatic reorganization of the fire department and that this reorganization threatened firefighter safety. Specifically, plaintiff alleged that the layoffs would increase response time to a fire emergency, which would allegedly allow fires to escalate, making them more difficult and more dangerous to extinguish. Moreover, plaintiff claimed that this problem would be compounded by the smaller number of firefighters present at the scene of a fire.

The circuit court ordered defendant to show cause why the injunction should not be granted. On June 28, 2006, the court
598 conducted a hearing on the preliminary injunction. However, the court took no witness testimony at the hearing. Plaintiff *598 relied on the assertions in its verified complaint and defendant submitted several affidavits to counter plaintiff's allegations. One affidavit particularly pertinent to this case was submitted by the chief of the Pontiac Fire Department, Wilburt McAdams.

In his affidavit, McAdams addressed many of plaintiff's allegations that the proposed layoffs threatened firefighter safety. The affidavit noted that the "great majority" of calls received by the fire department are medical runs rather than fire runs. McAdams contended that minimum staffing levels would be maintained at all times and that in the event staffing reached critically low levels, firefighters would only respond to fires and not medical runs, which would be handled by private ambulance services.

McAdams further averred that firefighter safety at the site of a fire would not be jeopardized by the layoffs. The department's remaining 89 firefighters would continue to adhere to basic safety protocols such as the "incident command system"[4] and the "two in, two out" rule.[5] Moreover, the affidavit asserted that the number of firefighters at the scene of a fire would be unaffected. McAdams claimed that the number of firefighters on each rig would actually increase from three or four to four firefighters. Finally, McAdams averred that the fire department would continue to follow all state and local workplace safety rules and regulations and it would continue to participate in mutual aid programs where nearby communities would lend their firefighters if assistance were required.

In a written opinion issued on June 30, 2006, the circuit court granted the preliminary injunction after ruling that plaintiff satisfied the four traditional elements for injunctive relief.[6] The court found that both the laid-off firefighters and those who would remain faced a threat of significant, irreparable harm in the absence of injunctive relief. With respect to the laid-off firefighters, the court found that they would "los[e] their jobs, salary and benefits and create a current hardship that cannot be compensated even if a subsequent arbitration decision would award those laid off a reinstatement of their positions and back wages." As to the remaining firefighters, the court found that they

> may be irreparably harmed since a reduction in the workforce and the closing of several City fire stations would result in a significant increased risk of harm for the remaining firefighters. Fewer firefighters would be available
> 599 to respond to fires and the closing of stations *599 caused by the [layoff] would result in the firefighters having to cover a larger territory. The remaining firefighters would thus not be able to respond as quickly as they used to[,] which means that they would be faced with fires that have increased in intensity or size and as a result are more dangerous.

Defendant appealed the circuit court's order to the Court of Appeals, which upheld the preliminary injunction in a split, unpublished decision.[7] The majority held that the trial court did not abuse its discretion when it granted the injunction, particularly its findings that plaintiff would suffer irreparable harm and that plaintiff demonstrated a likelihood of success on the merits. The dissenting member of the panel argued that the trial court abused its discretion because plaintiff did not meet its burden of demonstrating irreparable harm. With respect to the laid-off firefighters, the dissent noted that injunctive relief was inappropriate to remedy economic injuries. With respect to the remaining firefighters, the dissent observed that in view of defendant's proffered evidence that the layoffs would not jeopardize firefighter safety, the record did not support the trial court's conclusion to the contrary.

Defendant filed an application with this Court seeking leave to appeal, which we granted.[8]

STANDARD OF REVIEW

We review a trial court's decision to grant injunctive relief for an abuse of discretion.[9] We have recently offered the following articulations of the abuse of discretion standard. There are circumstances where a trial court must decide a matter and there will be no single correct outcome; rather, there may be more than one reasonable and principled outcome.[10] The trial court abuses its discretion when its decision falls outside this range of principled outcomes.[11]

ANALYSIS

The Court of Appeals has succinctly stated that "'[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.'"[12] In the
600 context of labor disputes, this Court *600 has observed that "it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace."[13] This Court recently reiterated the longstanding principle that "a particularized showing of irreparable harm ... is ... an indispensable requirement to obtain a preliminary injunction."[14] The mere apprehension of future injury or damage cannot be the basis for injunctive relief.[15] Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available.[16]

MCR 3.310 governs the procedure for issuing a preliminary injunction. According to MCR 3.310(A)(1), unless otherwise provided by statute or court rule, an injunction may not be granted without a hearing. At this hearing, "the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued...."[17] If a court grants preliminary injunctive relief, a trial on the merits must be held within six months of the injunction issuing, except for good cause or a stipulation from the parties to extend the time.[18] Given the extraordinary nature of injunctive relief, our court rules contemplate expeditious resolution of the underlying claim or claims once a preliminary injunction issues.

With these general precepts in mind, we must consider whether the circuit court abused its discretion when it granted plaintiff's motion for preliminary injunction. The first half of the circuit court's irreparable-harm analysis centered on its belief that the layoffs would inflict considerable financial hardship on the laid-off firefighters. We agree with the Court of Appeals dissent that this alleged injury is not irreparable and not the proper subject of injunctive relief. There exists an adequate legal remedy for laid-off firefighters. If the layoffs violated the CBA or constituted an unfair labor practice, MERC or a grievance arbitrator can award back pay, order reinstatement, or provide another remedy to make the laid-off firefighters whole.[19] Granting extraordinary equitable relief to remedy these economic injuries is unnecessary and inappropriate because they can be remedied by damages at law.[20]

601 *601 In the second half of its irreparable-harm analysis, the circuit court found that the layoffs would deplete the number of available firefighters, which would increase the remaining firefighters' workload and lengthen their response time, which in turn would require firefighters to fight larger, more intense, and more dangerous fires. Thus, firefighter safety would be jeopardized. To support this chain of logic, the circuit court appeared to adopt without reservation plaintiff's factual assertions.

However, while plaintiff's argument that staffing decisions might affect firefighter safety is appealing as a general proposition, upon closer scrutiny, plaintiff alleged nothing more than an apprehension of future injury or damage. Indeed, the circuit court could only speculate that the firefighters "may" have been irreparably harmed by the layoffs. Neither plaintiff nor the circuit court detailed how the remaining firefighters faced *real* and *imminent* danger from the layoffs rather than future, speculative harm. Under established principles governing injunctive relief, plaintiff's verified complaint, standing alone, failed to make a particularized showing of irreparable harm. Thus, plaintiff failed its burden of proof from the outset.

In reaching this conclusion, we do not trivialize the dangers accompanying firefighting. However, because firefighting is a dangerous job, every managerial decision in the abstract might touch on a safety issue. A mere apprehension of reduced safety by the union is insufficient grounds for a court to grant equitable relief. Otherwise, the extraordinary nature of a preliminary injunction would be trivialized. Plaintiff bears the responsibility of submitting sufficiently persuasive evidence that particular, irreparable harm will result if an injunction does not issue.

Further, even if we assumed arguendo that plaintiff initially succeeded in demonstrating particularized, irreparable harm, it failed to carry its burden of proof in the face of contrary evidence submitted by defendant that specifically refuted plaintiff's allegations. For instance, in response to plaintiff's allegation that the number of firefighter personnel at a fire scene would be limited and reduced to unsafe levels, Fire Chief McAdams stated that the number of firefighters present at a fire would not be reduced by the layoffs and that the number of firefighters in each rig would increase from three or four to four. And McAdams averred that additional, outside support was available, if needed. For instance, because the "great majority" of calls to which the fire department responded were medical runs, private ambulance services, rather than firefighters, would be used to respond to those calls if the department was functioning at its minimum daily staffing level. Thus, the firefighters would remain available to fight fires. Also, because the department participated in mutual aid programs with the fire departments of neighboring communities, additional firefighters from other communities could be called on for assistance. Moreover, safety protocols, such as the "two in, two out" rule and the incident command system, would remain in place at the scene of every fire. Defendant submitted evidence that it would maintain the same number of firefighters at the scene of a fire, would retain
602 existing policies to protect the health and safety of firefighters, and would use outside resources to *602 ensure that a

minimally staffed fire department did not overburden firefighters with medical runs at the expense of fighting fires. Simply put, plaintiff's nonspecific allegations of irreparable harm were refuted by the more specific, sworn statements in Fire Chief McAdams's affidavit.

In the face of this conflicting evidence that blunted the force of plaintiff's safety allegations, it behooved plaintiff to do more than rely on its initial factual allegations. Plaintiff did not do so. Thus, for this additional reason, it failed to carry its burden of demonstrating irreparable harm under MCR 3.310(A).

We are not second-guessing the circuit court's discretion to substitute the outcome we prefer. For reasons that are unclear, the circuit court in its written opinion granting the preliminary injunction seemed to credit only plaintiff's allegations and did not at all consider defendant's contrary evidence. Plaintiff failed to carry its burden of proof to make a particularized showing of irreparable harm and also failed to maintain this showing in the face of defendant's contrary evidence. A grant of a preliminary injunction under these circumstances falls outside the principled range of outcomes. Thus, the circuit court abused its discretion when it granted the injunction. Accordingly, we reverse the Court of Appeals and vacate the circuit court order.[21]

Reversed; preliminary injunction vacated.

TAYLOR, C.J., CORRIGAN and MARKMAN, JJ., concur.

MARILYN KELLY, J. (*dissenting*).

I disagree with the majority's conclusion that the Pontiac Fire Fighters Union failed to meet its burden of showing that the proposed layoff of 28 firefighters would cause irreparable harm to the remaining firefighters.[1] The union alleged that the layoffs would lead to the closing of fire stations and would lengthen the time for responding to fires. The firefighters would travel longer distances to reach fires and would encounter longer-burning, and therefore more dangerous, fires. The fire chief's affidavit on behalf of the city did not rebut this allegation. To the extent that it granted injunctive relief based on this unchallenged allegation, the circuit court did not abuse its discretion.[2]

The union alleged in counts 9, 24, and 25 of the verified complaint that the layoffs would affect firefighter safety:

603

> 9. Plaintiff is informed and believes that if the unilateral layoff decision is *603 implemented, the Pontiac Fire Department will undergo substantial adverse reorganization which will include the closing of fire stations, the reduction of staffing on fire apparatus, the elimination of EMS-ALS rescue units, the realignment and expansion of fire territories, the elimination of mutual aid participation for hazardous materials and technical rescue responses, and other unilateral changes many of which will constitute violations of the Agreement in such matters as staffing, reduction of personnel on vacation, and use of Kelly days.
>
> * * *
>
> 24. The layoff of 28 fire fighters and fire fighter paramedics will reduce the fire extinguishment and medical/rescue capability of the Fire Department to unacceptable levels posing a threat and hazard to fire fighters and citizens alike.
>
> 25. The reorganization of the Fire Department, the substantial reduction of personnel, and the closing of fire stations will increase response time to a fire scene and/or medical/rescue run. Increased response time of emergency equipment poses a hazard to responding fire fighters and citizens on the route. As a consequence of delay in responding to a fire scene, the fire escalates making extinguishment more difficult and increasing the danger to fire fighters and possibly occupants of a dwelling. The number of personnel at a fire scene will be limited and reduced to unsafe levels.

The city countered these allegations with an affidavit from Fire Chief Wilburt McAdams, which stated in relevant part:

> 2. That the great majority of calls to which the department responds are medical runs.
>
> 3. That the department will continue to maintain minimum staffing levels. In the event the department is at the minimum level of seventeen firefighters on a given day, private ambulance services will be used to respond to medical runs, and the City's firefighters will be used solely for fighting fires.

4. That, even after the layoff of the 28 firefighters, the department will have 89 firefighters, and will continue to operate utilizing both an incident command system and the "two in two out" rule which forbids any firefighter from entering a structure fire unless he/she is accompanied by another firefighter and there are two firefighters outside the structure. In addition, the department will continue to assign a safety officer to each fire. The number of firefighters at a fire scene will not be impacted.

5. Using the incident command system, firefighters will not enter a burning structure until there has been a careful assessment of the fire and the incident commander allows entry.

4. [sic] That, in addition, the department will continue to be in compliance with all applicable departmental rules and regulations of the City of Pontiac and State of Michigan, including all OSHA regulations. The statements of the NFPA are not binding rules and have not been adopted in Michigan.

5. [sic] The number of firefighters per rig will actually increase from 3-4 currently to 4 for all engines. In addition, the department will continue to participate in mutual aid, under which firefighters from other departments ... can be called for assistance if needed.

604 The union's complaint alleged both that fewer firefighters would be available to *604 fight fires and that their response time would be increased. The fire chief averred that the number of firefighters available to fight fires would remain the same, and so would the safety rules. However, the fire chief did not offer a solution to the problem of increased response time. Nor did he explain how existing safety rules would protect the firefighters who would confront more intense fires.

The circuit court issued a preliminary injunction specifically based on the union's allegation that the closing of fire stations would affect the remaining fire stations' response time:

> ... Plaintiff may be irreparably harmed since a reduction in the work-force and the closing of several City fire stations would result in a significant increased risk of harm for the remaining firefighters. Fewer fire fighters [sic] would be available to respond to fires and the closing of stations caused by the lay off would result in the firefighters having to cover a larger territory. The remaining firefighters would thus not be able to respond as quickly as they used to which means that they would be faced with fires that have increased in intensity or size and as a result are more dangerous.

The majority faults the circuit court for not considering the fire chief's affidavit, and it faults the union for not offering additional evidence in response to the affidavit. At the show-cause hearing, the union did offer to present additional testimony and diagrams of the runs.[3] Thus, the union cannot be faulted for failing to present additional evidence. The majority's conclusion that the circuit court failed to consider the fire chief's affidavit is also unpersuasive. Rather, the union met its burden of proof through the unchallenged allegations in its complaint. To the extent that the circuit court based its order on these unchallenged allegations, it did not need to address the fire chief's other averments.

The circuit court did not abuse its discretion in concluding that irreparable harm to the remaining firefighters called for injunctive relief.[4] I would affirm the judgment of the Court of Appeals and the preliminary injunction.

MICHAEL F. CAVANAGH and WEAVER, JJ., agree.

[1] Article VII, Section 12 of the CBA provided: "This Agreement shall remain in full force and effect from July 1, 2002 through June 30, 2004, and it shall be extended automatically thereafter on a daily basis until a new contract is negotiated or ordered."

[2] Plaintiff relied on Article IX, Section 7.D.4 of the CBA, which provided in pertinent part that "[d]uring the duration of the Agreement, there will be no layoff of bargaining unit personnel...." Defendant relied on other portions of the CBA that seemed to presume that defendant could lay off union members. For instance, Article IX, Section 9 set forth advance notice requirements for layoffs such as "[i]f workers are to be laid off, a fourteen (14) day notice shall be given of the date when their services shall no longer be required."

[3] The complaint alleged four counts: (1) breach of the CBA; (2) unfair labor practice for failure to bargain under the public employment relations act (PERA); (3) city charter violation; and (4) health and safety violation.

[4] According to the affidavit, the incident command system prohibits a firefighter from entering a burning structure unless, after a careful assessment of the fire, an incident commander permits entry.

[5] According to the affidavit, under this rule, a firefighter cannot enter a structure that is on fire without being accompanied by another firefighter and two firefighters remain stationed outside the structure.

[6] In *Michigan Coalition of State Employee Unions v. Civil Service Comm.*, 465 Mich. 212, 225 n. 11, 634 N.W.2d 692 (2001), this Court noted that besides the demonstration of irreparable harm, the three additional factors in a preliminary injunction analysis are (1) whether harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (2) the strength of the moving party's showing that it is likely to prevail on the merits, and (3) harm to the public interest if an injunction is issued.

With respect to these three remaining factors, the circuit court in the present case concluded (1) that the balance of harm favored plaintiff notwithstanding defendant's financial difficulties, (2) that plaintiff demonstrated a substantial likelihood of success on the merits, and (3) that the public faced less harm if the injunction issued than if it did not.

[7] *Pontiac Fire Fighters Union Local 376 v. City of Pontiac,* unpublished opinion per curiam of the Court of Appeals, issued November 30, 2006 (Docket No. 271497), 2006 WL 3459069.

[8] 478 Mich. 903, 732 N.W.2d 534 (2007). The grant order asked the parties to address

(1) whether the circuit court had jurisdiction to grant a preliminary injunction with respect to the breach of contract claim (count I) and the unfair labor practice claim (count II), and (2) if the circuit court had jurisdiction: (a) whether it abused its discretion in issuing an injunction to prevent layoffs based on alleged irreparable harm to the laid-off employees; (b) whether the plaintiff presented sufficient evidence to support its claim of an increased risk of harm to the firefighters who would not be laid off; and (c) whether the plaintiff is likely to prevail on its breach of contract and unfair labor practice claims.

With respect to the first question in our grant order, we agree with the parties that the trial court has jurisdiction to issue an injunction in aid of MERC's jurisdiction to decide unfair labor practice charges. MCL 423.216(h).

[9] *Michigan Coalition*, 465 Mich. at 217, 634 N.W.2d 692.

[10] *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388, 719 N.W.2d 809 (2006).

[11] *Id.*

[12] *Kernen v. Homestead Dev. Co.*, 232 Mich. App. 503, 509, 591 N.W.2d 369 (1998), quoting *Jeffrey v. Clinton Twp.*, 195 Mich.App. 260, 263-264, 489 N.W.2d 211 (1992).

[13] *Holland School Dist. v. Holland Ed. Ass'n*, 380 Mich. 314, 326, 157 N.W.2d 206 (1968).

[14] *Michigan Coalition*, 465 Mich. at 225-226, 634 N.W.2d 692.

[15] *Fenestra Inc. v. Gulf American Land Corp.*, 377 Mich. 565, 601-602, 141 N.W.2d 36 (1966); *Dunlap v. City of Southfield*, 54 Mich. App. 398, 403, 221 N.W.2d 237 (1974) ("[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural."). See also *Royal Oak School Dist. v. State Tenure Comm.*, 367 Mich. 689, 693, 117 N.W.2d 181 (1962) (injunctive relief inappropriate where there is no proof that the party would suffer irreparable injury).

[16] *Grand Rapids Electric R Co v. Calhoun Circuit Judge*, 156 Mich. 419, 422, 120 N.W. 1004 (1909).

[17] MCR 3.310(A)(4).

[18] MCR 3.310(A)(5).

[19] See, e.g., MCL 423.216(b).

[20] *Thermatool Corp. v. Borzym*, 227 Mich. App. 366, 377, 575 N.W.2d 334 (1998). Plaintiff relies on this Court's dictum in *Michigan State Employees Ass'n v. Dep't of Mental Health*, 421 Mich. 152, 168, 365 N.W.2d 93 (1984), that "[w]e do not hold that the absence of usable resources and of obtainable alternative sources of income with which to support one's self and one's dependents, coupled with the prospect of destitution, serious physical harm, or loss of irreplaceable treasured possessions, could never support a finding of irreparable injury in an appropriate case." We doubt whether the *Michigan State Employees Ass'n* Court was correct that this is an adequate basis to support a finding of irreparable injury, but, in any event, the record in this case does not support plaintiff's reliance on it.

[21] The trial court ruled, and the Court of Appeals majority agreed, that plaintiff demonstrated a likelihood of success on the merits of its underlying claims. Because plaintiff failed to prove that it would suffer irreparable harm from the layoffs, we take no position on whether plaintiffs could successfully prove a breach of the CBA or an unfair labor practice.

[1] The union had filed an unfair labor practice charge against defendant with the Michigan Employment Relations Commission (MERC). It requested an injunction from the circuit court "pending resolution of the parties' dispute by MERC." It also asked for and received from the court an injunction to maintain the status quo pending compulsory arbitration under Act 312, MCL 423.231 *et seq.* But no Act 312 arbitration was actually pending when the circuit court issued the injunction. The injunction was properly issued in aid of MERC's jurisdiction over the unfair labor practice charge.

[2] MCR 3.310(A)(4) states that "[a]t the hearing on an order to show cause why a preliminary injunction should not issue, the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued...."

[3] In deciding not to take testimony, the circuit court followed *Campau v. McMath*, 185 Mich.App. 724, 728, 463 N.W.2d 186 (1990). In that and other cases, the Court of Appeals held that an evidentiary hearing was not required for issuing an injunction. See also *Fancy v. Egrin*,