

131463

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
SCHUETTE, P.J., BANDSTRA, and COOPER, JJ.

DETROIT FIRE FIGHTERS ASSOCIATION,
I.A.F.F. LOCAL 344,

Supreme Court No. 131463

Plaintiff-Appellees

Court of Appeals No. 266654

v

CITY OF DETROIT,

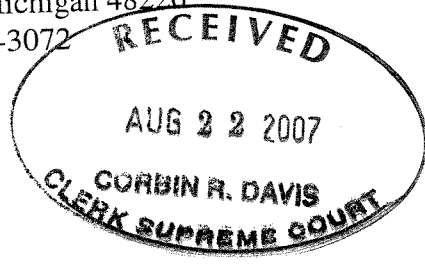
Lower Court No. 05-526691 CL
HON. SUSAN D. BORMAN

Defendant-Appellant.

**DEFENDANT-APPELLANT CITY OF DETROIT'S
SUPPLEMENTAL BRIEF**

CITY OF DETROIT LAW DEPARTMENT

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**DEFENDANT-APPELLANT CITY OF DETROIT'S
SUPPLEMENTAL BRIEF**

I.

Introduction

By order¹ of this Honorable Court, the parties were directed and amicus curiae were invited to address these two issues:

- 1) Whether *Metropolitan Council No. 23 v. Center Line*² correctly held that jurisdiction to enforce section 13 of Act 312³ resides in the circuit court? and
- 2) Whether the Michigan Employment Relations Commission (“MERC”) has primary jurisdiction⁴?

The City respectfully submits that *Center Line I* was wrongly decided in two critical respects. First, the *Center Line I* court severed the necessary connection between Act 312⁵ and PERA by holding that a Section 13 violation is “separate but distinct from PERA,”⁶ despite the express statutory language in Act 312 that it is “supplementary to [PERA] and does not repeal or amend any of its provisions.”⁷ Second, the *Center Line I* court used that erroneous analysis to bootstrap its

¹Order dated June 15, 2007 Lexis 1310, Exhibit 1.

²78 Mich App 281; 259 N.W. 2d 460 (1977). Hereinafter referred to as “*Center Line I*.”

³MCL 423.243.

⁴The order dated June 15, 2007 refers to the case of *Travelers Ins. Co. v. Detroit Edison*, 465 Mich 185; 631 N.W. 2d 733 (2001).

⁵MCL 423.231 et seq.

⁶MCL 423.201 et seq.

⁷MCL 423.244

conclusion that a violation of Section 13 need not rise to the level of an unfair labor practice and that the circuit court had jurisdiction to decide the underlying Section 13 dispute. Importantly, the subsequent decision of this Court in *Center Line II*⁸ reaffirmed that the scope of Act 312 was limited to mandatory subjects of bargaining and the Act 312 was supplemental to PERA.

Contrary to the holding of *Center Line I*⁹, and consistent with *Center Line II*, the City submits that the text of Section 13 can only be interpreted that a violation of Section 13 must be in the form of an unfair labor practice as it is referenced in Act 312 and defined in PERA¹⁰ and for which MERC has primary jurisdiction consistent with the principles of *Travelers v. Detroit Edison*.¹¹

II.

The *Center Line I* decision was unsupported by the text of Act 312

Center Line I concerned an appeal by the City of Center Line after two permanent injunctions were issued against the Center Line by the Circuit Court under Section 13 of Act 312. Center Line argued before the Court of Appeals that the circuit court did not have subject matter jurisdiction over Section 13 because “PERA rests exclusive jurisdiction over the dispute between the union and the city in the Michigan Employment Relations Commission.”¹² Implicit in Center Line’s argument was

⁸*Metropolitan Council No. 23, Local 1277 v. City of Center Line*, 414 Mich 642; 327 N.W. 2d 822 (1982). Hereinafter referred to as “*Center Line II*.”

⁹The City acknowledges that the circuit courts of this state possess general equitable jurisdiction and that in appropriate situations injunctive relief could be issued in accordance with MCR 3.310 to enjoin alleged violations of Section 13.

¹⁰MCL 423.215

¹¹451 Mich 185; 631 N.W.2d 733 (2001).

¹²*Center Line I*, supra. at 284.

a recognition for a violation of Section 13 was unfair labor practice committed during the pending of Act 312.

The *Center Line I* Court rejected this line of reasoning:

While the City's actions may have constituted unfair labor practices under *MCLA 423.210*; *MSA 17.455(10)*, the union did not invoke the provisions of PERA. **1969 PA 312 is separate and distinct from PERA**, dealing with the particular problems of labor disputes with policemen and firemen. Because of the need for expediency in dealing with labor problems that might disrupt the crucial services these public employees provide, enforcement of 1969 PA 312 should not be encumbered by the procedures set forth in PERA. **Nothing in 1969 PA 312 or any other statute prevents the judicial enforcement of the provisions of 1969 PA 312 and it was proper for the circuit court to assume jurisdiction over the dispute.** *Const 1963, art 6, § 13.*¹³ (Emphasis added)

The Court of Appeals' conclusion that a circuit court had and should exercise jurisdiction under Section 13 was made on alleged pragmatic grounds ("expediency") without regards to the text. While the Court of Appeals rejected the notion that section 13 violations were not within the exclusive jurisdiction of MERC, it did not state that MERC lacked jurisdiction over Section 13 violations nor did it preclude the possibility that an unfair labor practice committed during Act 312 could form the basis of a Section 13 violation.

The terms "wages, hours and other terms and condition of employment" which appear in both Section 13 of Act 312 and Section 15 of PERA identify a legal term of Art: in labor law, that is, "mandatory subjects of bargaining" and it is evident from their texts that Section 13 of Act 312 and Section 15 of PERA concern mandatory subjects of bargaining.

Section 13 of Act 312 states:

¹³*Center Line I* at 284.

During the pendency of proceedings before an arbitration panel, **existing wages, hours and working conditions of employment** shall not be changed by the action of either party without the consent of the other but a party may so consult without prejudice to his rights or position under this Act. (emphasis added)

This provision duplicates the requirement under PERA that a municipal employer may make a change in a mandatory subject of bargaining without first satisfying its duty to bargain over that proposed change. The duty to bargain is expressed by PERA,¹⁴ Section 15 states:

Sec. 15. A public employer shall bargain collectively with the representatives of its employees as defined in Section 11¹⁵ and is authorized to make and enter into collective bargaining agreements with such representatives. For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to **wages, hours, and other terms and conditions of employment**, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. (emphasis added)

The key phrase linking the subject matter of Section 13 of Act 312 with Section 15 of PERA is the phrase: “wages, hours and other conditions of employment” which is also known as “mandatory subjects of bargaining,”¹⁶ under PERA, Act 312 and the NLRA.¹⁷ As an initial textual matter, a valid violation of Section 13 is textually indistinguishable from a violation of Section 15

¹⁴MCL 423.215

¹⁵Section 423.211.

¹⁶*Metropolitan Council No. 23, Local 1277 v. City of Center Line*, 414 Mich 642; 327 N.W. 2d 822 (1982). Hereinafter referred to as “*Center Line II*.”

¹⁷This phrase in PERA and Act 312 is adopted from section 8(d) of the National Labor Relations Act (NLRA), 29 USC 158(d).

of PERA.

The relationship of these two provisions finds further textual support in Section 14 of Act 312 which states:

Sec. 14. This act is deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, being *sections 423.201 to 423.216* of the Compiled Laws of 1948, and does not amend or repeal of its provisions; but any provisions thereof requiring fact-finding procedures shall be inapplicable to disputes subject to arbitration under this act. (MCL 423.244)

The definition of supplementary is “added or serving as a supplement; additional.” Merriam-Webster Online, and the definition of supplemental is “supplying something additional; adding what is lacking.” Blacks Law Dictionary (8th Ed 2004). As noted in 1A Sutherland Statutory Construction 22:24 (6th Ed), a supplementary act is:

[A]n act not purporting to amend but which makes an addition to a prior statute without impairing any existing provision. It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence without changing or modifying the original. It need not state that it is supplementary.

When the Legislature adopted Act 312 and expressly made it supplemental to PERA, it intended the two acts to be read as a unified provision regulating public sector labor disputes.¹⁸

The text of Section 13 of Act 312 does not specify what remedies are available, if any, and in what forums such disputes may be resolved. This absence is more meaningful in light of the language of Act 312 which expressly addresses judicial participation at the circuit court level and provides for the following three types of actions:

¹⁸ The City’s position is consistent with this Court’s opinion *Center Line II* and more recent Court of Appeals decision in *Jackson Firefighters v. City of Jackson*, 227 Mich App 520; 575 N.W. 2d 823 (1998).

1. Judicial enforcement of majority decisions of the arbitration panel under MCL 423.240.
2. Judicial imposition of contempt penalties for labor organizations or public employers for willfully disobeying an order of enforcement under MCL 423.241.
3. Judicial review of orders of the arbitration panel under MCL 423.142.

Alleged violations of PERA, Section 15, are within the jurisdiction of MERC under Section 16¹⁹ and which includes express provisions for injunctive relief before the circuit court in aid of an unfair labor practice complaint and for which the traditional equitable principles apply.²⁰ The only textual support for the issuance of injunctive relief under Section 13 of Act 312 is by reference to sections 15 and 16 of PERA.

Given that the text of Act 312 provides for express remedies in three discreet instances, its absence in section 13 precludes a conclusion that section 13 provides a stand-alone cause of action which does not constitute an unfair labor practice under PERA and not subject to its equitable injunction standards.

III.

The holding of *Center Line I* is contrary to this Court's decision in *Center Line II*

Center Line I's holding has been undercut by a later decision of this Court. In *Center Line II* this Court examined the text of Act 312 and PERA to determine the authority of an Act 312 panel:

While Act 312 does not specifically delineate the scope of the arbitration panel's authority, it can be inferred from an analysis which considers the public employee relations act (PERA), *MCL 423.201 et*

¹⁹MCL 423.216.

²⁰*Mich Coalition of State Emp Unions v. Mich Civ. Svc. Com*, 465 Mich 212; 634 Mich NW 2d 692 (2001).

seq.; MSA 17.455(1) et seq., and Act 312 together. As stated in § 14, Act 312 was clearly intended to supplement PERA. MCL 423.244; MSA 17.455(44).

* * * * *

Those issues that fall into the category of “wages, hours and other terms and conditions of employment” are deemed to be mandatory subjects of bargaining.²¹

This Court in *Center Line II* identified the three categories of bargaining: mandatory, permissive and illegal and determined that Act 312, read in conjunction with PERA, limited the authority of an Act 312 arbitration panel to mandatory subjects of bargaining: it would be inconsistent to conclude that the arbitration panel can issue an award on a permissive subject when the parties do not even have a duty to bargain over such a subject. To hold otherwise would grant the Act 312 arbitration panel a free hand to compel agreement on any matters, even those beyond “wages, hours and other terms and conditions of employment.”²²

While the *Center Line II* opinion recognized the *Center Line I* opinion: “This decision is not the subject of our review,”²³ it is clear that this Court’s reasoning in *Center Line II* conflicted with the relevant parts of the *Center Line II*’s opinion and called into doubt its ultimate viability.

The contradiction between the *Center Line* opinions is most evident by the *Center Line II* opinion that: 1) the authority of Act 312 was limited to mandatory subjects of bargaining and 2) the relationship between Act 312 was as a supplement to PERA and not “separate and distinct.”

If Act 312’s authority is limited to mandatory subjects of bargaining, alleged violations of section 13 of Act 312 must necessarily, both by text and legal logic, be limited to changes in mandatory subjects of bargaining, which is known under PERA as an unfair labor practice.

²¹*Center Line II* supra at 651-652.

²²*Center Line II* supra at 654.

²³*Center Line II* supra at 647.

Consequently, an allegation of a violation of section 13 of Act 312 must allege an unfair labor practice. MERC has consistently held that a mere breach of contract, absent repudiation, is not an unfair labor practice. MERC²⁴ has defined repudiation as a rewriting of the contract or complete disregard of the contract as written. In order for MERC to find repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit and, there must be no bona fide dispute over interpretation of the contract.²⁵

The fact that this Court's decision in *Center Line II* was issued in 1982, five years after the *Center Line I* decision renders hollow the DFFA claims that overturning *Center Line I* would represent some great departure from existing law. Rather, overturning *Center Line I* would explicitly clarify that which should have been evident for the past 25 years: that *Center Line I* was incorrectly decided because it contradicts *Center Line II*. In fact, the three Court of Appeals decisions cited most prominently by the DFFA: *Center Line I*, *DPOA*²⁶ and the *DFFA*²⁷ case which is the subject of this appeal ultimately all depend on the discredited notion that Act 312 is "separate and distinct" from PERA and not supplementary.

IV.

Section 13 is extended beyond its textual and logical limits under *Center Line I*

Reading Section 13 as part of a "separate and distinct" Act 312 creates its own set of interpretive problems. Section 13 itself contains no language authorizing injunctive relief, circuit court (or MERC) jurisdiction or any standards for determining the level of conduct creating a cause

²⁴*Central Mich Univ.*, 1997 MERC Lab Op 501,507.

²⁵*Gibraltar Sch Dist* 16 MPER 36 (2003).

²⁶*DPOA v. City of Detroit*, 142 Mich App 248; 396 N.W. 2d 480 (1985).

²⁷*DFFA v. City of Detroit*, 271 Mich App 457; 722 N.W. 2d 705 (2006).

of action (breach of contract, unfair labor practice even a change of a permissive subject of bargaining). A separate and distinct Section 13 is limited only by the creativity of counsel and credulity of the courts which can be seen in the Court of Appeals opinion which is the subject of this appeal in which there were no factual findings or any meaningful application of any recognized standards, equitable or otherwise, in the issuance and affirmance of the injunction before this court. The further product of separate and distinct analysis is the City's inability to address the underlying merits to overturn such an improvident injunction because of a circuit court action brought for the limited purpose of preliminary injunctive relief.

In its Appellee Brief, the DFFA characterizes Section 13 violations generally and the standard for injunctive relief under Section 13 is the demonstration "that the City's Plan disturbs the status quo."²⁸ Under the DFFA's analysis: "Act 312's status quo requirement is not limited to contract provisions."²⁹ So despite the acknowledged fact that Act 312 (per *Center Line II*) only concerns itself with mandatory subjects of bargaining, Section 13 can nevertheless be used to remedy (in addition to changes in mandatory subjects of bargaining), permissive subjects of bargaining, breach of contract and, most notably, non-contractual provisions.

By contrast, the statutory text and the decisions of this Court which apply the analysis of "Act 312 supplements PERA," either expressly or implicitly, identify clear standards for:

- 1) what conduct violates Section 13: that is, an unfair labor practice;
- 2) what standard applies to the issuance of an injunction: that is, the traditional equitable standard under MCR 3.310;

²⁸DFFA Appellee Brief, p.15, see also p.26.

²⁹DFFA Appellee Brief, p.42.

- 3) who has jurisdiction and expertise to resolve the underlying dispute: that is, MERC the principles of its unfair labor practice jurisprudence.

As stated in an earlier brief, this Court's *Center Line II* opinion needs to be strengthened by appropriately integrating Act 312 and PERA so litigants can understand and the lower courts can apply meaningful standards of law in deciding Section 13 injunction proceedings and litigants can ultimately resolve such disputes before the tribunal with the authority and expertise to decide such issues: MERC.

V.

MERC has Primary Jurisdiction over Section 13 violations

The Michigan Employment Relations Commission (MERC) has the authority to implement PERA³⁰ and possess exclusive jurisdiction over unfair labor practices³¹ and the primary jurisdiction³² over unfair labor practices relating to Act 312 proceedings.

Primary Jurisdiction applies “where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”³³ Primary jurisdiction is a prudential doctrine and is not waivable. The Court has the discretion to retain jurisdiction or dismiss the case without prejudice if the parties would not be unfairly disadvantaged by the invocation of primary jurisdiction.

³⁰*Jackson Firefighters Ass'n v. Jackson*, 227 Mich App 520; 575 N.W. 2d 823 (1998).

³¹*Lamphere Schoos v. Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 N.W. 2d 818 (1977).

³²*Jackson Firefighters*, supra at 526.


³³*Travelers Ins. Co. v. Detroit Edison*, 465 Mich 165; 631 N.W. 20733 (2001) (Travelers).

Consistent with the principles set forth by this Court in *Travelers*, resolution of a Section 13 dispute under Act 312 should be deferred to MERC which possesses the expertise with regards to the existence or not of an unfair labor practice. Because of MERC's exclusive jurisdiction over non-Act 312 unfair labor practices, deferral of Act 312 violations (unfair labor practices) would promote consistency and uniformity in the application of Michigan public sector labor law and would satisfy the need for orderly and sensible coordination of the work of MERC and the courts. There would be no unfairness to the parties in this case since the trial court only adjudicated the injunction issues without a finding on the merits with respect to any violation of section 13. The doctrine of primary jurisdiction clearly applies to the facts of this appeal and to injunction actions under section 13 more generally.

CONCLUSION

The City of Detroit respectfully requests that the Court issue an Order dissolving the injunctive order of the Wayne Circuit Court. The City further requests that *Center Line I* be overturned, that primary jurisdiction for section violations reside with MERC and that the Court issue a more formal decision clarifying the standards to be applied to bargaining over managerial decisions and their impact.

Respectfully submitted,

By: 
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(313) 237-3072

Dated: August 21, 2007

Exhibit 1

Order

Michigan Supreme Court
Lansing, Michigan

June 15, 2007

Clifford W. Taylor,
Chief Justice

131463 (75)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

DETROIT FIREFIGHTERS ASSOCIATION,
I.A.F.F. LOCAL 344,
Plaintiff-Appellee,

v

SC: 131463
COA: 266654
Wayne CC: 05-526691-CL

CITY OF DETROIT,
Defendant-Appellant.

On order of the Court, the motion for leave to file a supplemental brief is GRANTED. In light of the new issues being raised on appeal, the parties are directed to file additional supplemental briefs by August 1, 2007, addressing whether *Metropolitan Council No 23 AFSCME v Center Line*, 78 Mich App 281 (1977), correctly held that jurisdiction to enforce section 13 of Act 312, MCL 423.243, resides in the circuit court, and whether the Michigan Employment Relations Commission has primary jurisdiction to enforce section 13, see *Travelers Ins Co v Detroit Edison*, 465 Mich 185 (2001). The Court will determine whether to schedule reargument of the case next term after consideration of the briefs filed pursuant to this order.

The Michigan Municipal League, the Michigan Association of Counties, Michigan AFSCME Council 25, and the Michigan State AFL-CIO are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.



d0612

I, Corbin R. Davis, 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.

June 15, 2007

Corbin R. Davis

Clerk

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
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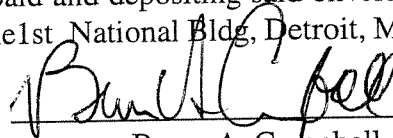
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Defendant-Appellant.

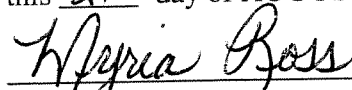
PROOF OF SERVICE

STATE OF MICHIGAN)ss.
COUNTY OF WAYNE)

Bruce A. Campbell, being first duly sworn, deposes and says that she is employed by the City of Detroit; that on AUGUST 21, 2007, she served the following: **DEFENDANT-APPELLANT CITY OF DETROIT'S SUPPLEMENTAL BRIEF AND PROOF OF SERVICE** upon: **HELVESTON & HELVESTON, P.C., Attorneys for Plaintiff-Appellee, RONALD R. HELVESTON (P14860), MINDY M. SCHWARTZ (P63135), 65 Cadillac Square, Cadillac Tower, Suite 3327, Detroit, MI 48226**, by placing the same in envelope(s) addressed as above and properly stamped with first-class postage fully prepaid and depositing said envelope(s) in a mail receptacle maintained by the U.S. Government in the 1st National Bldg, Detroit, MI 48226.


Bruce A. Campbell

Subscribed and sworn to before me
this 21 day of AUGUST 2007.


Notary Public, Wayne County, MI
My Commission expires: 9-3-2011