

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**DETROIT FIRE FIGHTERS ASSOCIATION,
IAFF LOCAL 344,**

Plaintiff-Appellee

v.

CITY OF DETROIT,

Defendant-Appellant

Supreme Court No. 131463

Court of Appeals No. 266654

Circuit Court No. 05-526691-CL
Hon Susan D. Borman

**BRIEF OF AMICUS CURIAE
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
IN SUPPORT OF THE
DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344**

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the decision of the trial court that that an injunction under Section 13 of Act 312, MCL 423.243, was necessary to maintain the *status quo* during the pendency of ongoing Act 312 arbitration proceedings.

The City of Detroit Answers:	No
The Detroit Fire Fighters Association Answers:	Yes
Amicus Curiae Answers	Yes
The Trial Court Answered:	Yes
The Court of Appeals Answer:	Yes

2. Whether the Trial Court properly determined and the Court of Appeals properly affirmed that the exercise of management rights may be a mandatory bargaining subject when such management actions “concern,” “affect,” “relate to” or are “intertwined” with mandatory bargaining subjects including fire fighter safety, health and workload?

The City of Detroit Answers:	No
The Detroit Fire Fighters Association Answers:	Yes
Amicus Curiae Answers	Yes
The Trial Court Answered:	Yes
The Court of Appeals Answer:	Yes

3. Whether the Trial Court and Court of Appeals properly analyzed and applied Michigan case law to require that the City’s management rights are limited in the instant case by the City’s duty to maintain the status quo with regards to such subjects during the pendency of Act 312 compulsory arbitration proceedings?

The City of Detroit Answers:	No
The Detroit Fire Fighters Association Answers:	Yes
Amicus Curiae Answers	Yes
The Trial Court Answered:	Yes
The Court of Appeals Answer:	Yes

4. Whether the Trial Court properly determined that an Injunction must issue in this case because the restructuring and layoff plan is so extreme that it alters mandatory subjects of bargaining, including, without limitation, fire fighter safety, contractual maintenance of terms and conditions of employment, seniority and parity?

The City of Detroit Answers:	No
The Detroit Fire Fighters Association Answers:	Yes
Amicus Curiae Answers	Yes
The Trial Court Answered:	Yes
The Court of Appeals Answer:	Yes

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The IAFF adopts, and incorporates herein, the background and procedural history of this case that is set forth in the brief submitted by Local 344.

INTEREST AND POSITION OF THE AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO, CLC (hereinafter “IAFF”) is an unincorporated association comprised of municipal, state, federal and private sector fire fighters throughout the United States and Canada. The IAFF’s mission includes protecting the safety and improving the working conditions of fire fighters and emergency medical services employees, as well as advancing the general health and welfare of those personnel, through collective bargaining, court action, grass roots lobbying and other appropriate means.

As the leading advocate for the rights of over 280,000 fire fighters throughout the United States and Canada, the IAFF seeks to promote effective collective bargaining for its members. Fire fighters throughout the nation rely on effective means to resolve employment disputes and other issues related to the terms and conditions of employment. Most fire fighters are prohibited by law from engaging in strikes and must, therefore, rely on collective bargaining, prior to the implementation of any plan that affects the terms and conditions of employment, to promote and protect their interests. In the present matter, plaintiff and Appellee, the Detroit Fire Fighters Association, International Association of Fire Fighters, Local 344 (hereinafter “Local 344”) asserts that the City of Detroit (hereinafter “City”) should be required to bargain over the impact of any decision that affects the safety and employment conditions of fire fighters prior to the implementation of the decision.

This *amicus* brief will demonstrate that in the absence of the right to strike, public employees must be allowed to bargain over the impact of decisions that affect the terms and conditions of their employment prior to the implementation of those decisions by an

employer. In the instant matter, if the City is permitted to avoid bargaining with Local 344 until after the implementation of the plan, such bargaining would be rendered futile because the City would have no incentive to negotiate fairly and in good faith with the union during the bargaining that takes place after the implementation of its plan. The adverse consequences of a unilateral implementation of the City's decision would already have impacted the fire fighters before their bargaining representative had the chance for effective input. As a result of the prohibition on fire fighters' right to strike, the right to enjoin implementation of the City's decision until after the City is required to bargain over the impact of the decision is the only protection afforded to fire fighters.

ARGUMENT

A. THE TRIAL COURT PROPERLY ISSUED AN INJUNCTION BECAUSE THE CITY SOUGHT TO ALTER THE TERMS AND CONDITIONS OF EMPLOYMENT OF FIRE FIGHTERS PRIOR TO THE CONCLUSION OF THE COMPULSORY ARBITRATION.

The Michigan Court of Appeals properly affirmed the decision of the trial court to issue an injunction to prevent implementation of the City's budgeting plan, which would have affected fire fighter safety, a term and condition of Local 344 fire fighters' employment, prior to completion of the ongoing arbitration between the parties. M.C.L. 423.243 (also "Section 12 of Act 312" or "Act 312") provides that

During the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act.

This Court has stated that M.C.L. 423.243 "specifically requires the public employer to maintain the status quo pending the Act 312 arbitration process." *Southfield Police Officers Ass'n v. City of Southfield*, 433 Mich. 168, 186 (1988). In *Detroit Police Officers Ass'n v. City of Detroit*, 135 Mich. App. 660 (1984), the Court of Appeals stated that the "direct effect of M.C.L. 423.243 is to preserve the status quo during arbitration proceedings" and to prevent a unilateral action that changes the terms and conditions of employment. *Id.* at 666.

In determining whether an employer's unilateral action affects a condition of employment for purposes of maintaining the status quo under M.C.L. 423.243, courts in Michigan consider cases which define mandatory subjects of collective bargaining. *Detroit Police Officers Ass'n v. City of Detroit*, 142 Mich. App. 248, 251-52 (1984). What constitutes a mandatory subject of bargaining in Michigan is decided on a case-by-

case basis. *Southfield Police Officers Ass'n v. Southfield*, 433 Mich. 168, 178 (1989); *Jackson Community College Classified and Technical Ass'n, MESPA v. Jackson Community College*, 187 Mich. App. 708, 712 (1994). It is well-established in Michigan that where a staffing issue is related to, or inextricably intertwined with the safety of members of a collective bargaining unit, the issue is subject to mandatory bargaining. *Trenton v Trenton Fire Fighters Union, Local 2710, IAFF*, 166 Mich App 285, 294-295; *Alpena v Alpena Fire Fighters Ass'n, AFL-CIO*, 56 Mich App 568, 575; overruled in part on other grounds *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 483, n 65 (1980).

In this case, it is unquestionable that the City's budgeting plan constitutes a staffing issue that is inextricably intertwined with the safety and workload of City fire fighters. If implemented, the plan would affect fire fighters' response time and require fire fighters to travel greater distances to fire scenes, thereby increasing the risk involved to fire fighters as a result of the exacerbation of the fires during these delays. Reductions in staffing levels mean that there are fewer fire fighters to respond to major fires and other emergencies — which obviously endangers the lives and safety of those fire fighters who are at the scene of the incident. Thus, the proposed layoffs would impact the safety and working conditions of fire fighters, and both the trial court and the Court of Appeals correctly determined that an injunction was proper under M.C.L. 423.343 to preserve the status quo until the completion of the ongoing arbitration proceedings.

B. BECAUSE PUBLIC EMPLOYEES ARE PROHIBITED FROM STRIKING, THE CITY SHOULD BE REQUIRED TO BARGAIN OVER THE IMPACT OF ITS BUDGETING PLAN PRIOR TO IMPLEMENTATION

In Michigan, it is undisputed that an employer is required to bargain over the impact of any decision to lay off employees. In *Metropolitan Council No. 23 v. City of Center Line*, 414 Mich. 642, 661 (1982), this Court stated that “while the initial decision to lay off [by management] is not a mandatory subject of bargaining, the impact of that decision is an issue for bargaining.” The question currently before this Court relates to the timing of this impact bargaining. Specifically, this Court must determine *when* the City is required to bargain with Local 344 over the impact of its budgeting plan.

As a general matter, in the public sector, when an employer is obligated to bargain in good faith regarding a change in a mandatory subject of bargaining, the bargaining must take place prior to the implementation of the change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1084 (1st Cir. 1981); *Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182, 1188 (8th Cir. 1978). The major distinction between public sector employees and their counterparts in the private sector is that the former are prohibited from striking, whereas the latter are not. In large part due to this prohibition on public employees’ right to strike, it is imperative that public employers bargain with public employees *prior* to any unilateral action so as not to render the collective bargaining rights of public employees completely meaningless. Stated differently, if a public employer were permitted to bargain over the impact of a decision *after* it has implemented its decision, there would be little, if any incentive for the public employer to compromise during the subsequent collective bargaining because

the public employer will have already achieved what it is being required to bargain for after the fact.

Decisions by courts in various states support this position. For in instance, in *School Board of Escambia County v. Public Employees Relations Commission*, 350 So.2d 819, 821 (Fla. 1st DCA 1977), the Florida Court of Appeals stated that there should be a relatively broad scope of collective bargaining negotiations between a public employer and public employees to help counterbalance the absence of the right to strike by public employees:

the constitutional and legislative prohibitions against strikes by public employees were [n]ever intended to give public employers a power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not to circumvent the rights of public employees to meaningful collective bargaining with their employer.

Later, in *School Board of Orange County v. Palowitch*, 367 So.2d 730, 731 (Fla. 4th DCA 1979), the Florida Court of Appeals commented that allowing a public employer to take unilateral actions under the theory of “management rights” would “gut the life” out of any statute permitting public employees to collectively bargain:

We do not agree with the petitioner's position that the right of ultimate decision making instills the right of unilateral action without bargaining because to hold that would effectively gut the life of the statute providing for bargaining by public employees. There are certain trade-offs in the statutory scheme not the least of which is the lack of right to strike.

In *Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*, 425 So. 2d. 133 (Fla. 1st DCA 1983), the Florida Court of Appeals addressed the “major distinction” between collective bargaining laws governing the public and private sector – private sector employees have the right to strike, whereas this right is “specifically denied to the public [sector] employee.” *Id.* at 139. Accordingly, the

court stated that public employers must be required to bargain prior to the implementation of any unilateral management decisions:

the stability to be encouraged in the bargaining relationship between public employer and employee requires the parties to conduct negotiations over a broad range of subjects, and . . . such stability might well be disrupted if one party were to be allowed to implement unilateral management decisions *prior to negotiations*.

Id. (emphasis added).

Similarly, in *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983), the employer school committee attempted to implement layoffs to the janitorial staff without first giving the union notice of the planned layoffs or providing the union any opportunity to bargain over the impact of this decision prior to its implementation. The Massachusetts Supreme Court, similar to this Court's decision in *Center Line*, stated that decisions to reduce a workforce level are an "exclusive [management] prerogative." *Id.* at 563. The court further noted, however, that "the means of achieving a reduction in force, by layoffs," and "the impact of that decision" can be made the subject of collective bargaining." *Id.* at 563-64. After concluding that the school committee refused to make itself available for negotiations with the union with respect to the impact of the proposed layoffs, and by refusing to bargain in good faith *before it sent the layoff notices to employees*, the court held that the employer committed an unfair labor practice by refusing to bargain in good faith with the union. *Id.* at 574-75.

In *American Federation of State, County and Municipal Employees v. State Labor Relations Board*, 274 Ill. App. 3d. 327 (1995), the Illinois Court of Appeals examined some of the positive affects that come from requiring a public employer to bargain with

public employees over the impact of its decision to lay off employees prior to the implementation of that decision:

it becomes clear that a decision to layoff employees . . . truly invites the use of the collective bargaining process. [A] bargaining representative is frequently in the best position to provide alternatives which may alleviate economic conditions and avoid employee layoffs. Not only is the representative authorized to negotiate on behalf of the employees, but he or she often possesses information which may not be available to management and which could influence management's decision to reduce its force.

Id. at 333. Recently, in *Forest Preserve District of Cook County v. Illinois Labor Relations Board*, 2006 Ill. App. LEXIS 1191, 181 L.R.R.M. 2109, (Ill. App. 1st Jan. 27, 2006), the court held that in the absence of any clear and unmistakable waiver by the union, a public employer commits an unfair labor practice when it implements a decision to lay off without first offering or attempting to bargain with the union over the impact of that decision. *Id.* at **48-50. See also *Chicago Park District v. Illinois Labor Relations Board, Local Panel and Service Employees International Union, Local 73*, 354 Ill App. 3d 595 (2004) (employer committed an unfair labor practice when it failed to provide the union notice or bargain with the union prior to its implementation of a “reduction of hours” plan).

These cases demonstrate that public employees are at a great disadvantage with respect to their ability to bargain collectively as a result of their inability to engage in work stoppages or strikes. As a result, negotiations between public employees and employers should be broad in scope, so as to offset the advantage held by public employers at the bargaining table. *Escambia County*, 350 So.2d at 821. If public employers were required to bargain with public employees only after their unilateral decisions have impacted the public employees’ safety and working conditions, it would

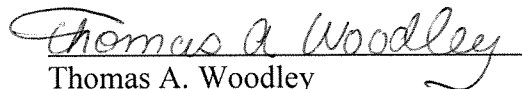
effectively render the collective bargaining rights provided to public employees under Michigan law meaningless. Accordingly, public employers should be required to bargain over the impact of any decision to restructure its work force, or lay off employees, prior to unilaterally implementing that decision.

CONCLUSION

The IAFF, in support of Local 344, respectfully requests that this Court affirm the decision of the Court of Appeals upholding an injunction maintaining the status quo until the completion of the ongoing arbitration proceedings. Additionally, the IAFF respectfully requests this Court to require the City to bargain with Local 344 over the impact of its plan prior to any unilateral implementation of that plan by the City.

Respectfully Submitted,

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ON BEHALF OF THE INTERNATIONAL
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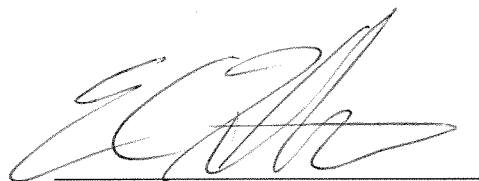
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PROOF OF SERVICE

I certify that 2 copies of the Brief of Amicus Curiae International Association of Fire Fighters were served on the following attorneys of record by regular mail on this 26th day of February, 2007.

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