

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Schuette, P.J., Bandstra, and Cooper, JJ.

DETROIT FIREFIGHTERS ASSOCIATION,
I.A.F.F. LOCAL 344,

Plaintiff-Appellee

Supreme Court No. 131463

v

Court of Appeals No. 266654

CITY OF DETROIT,

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE MICHIGAN
EMPLOYMENT RELATIONS COMMISSION**

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INTRODUCTION

On November 13, 2006, this Court granted Defendant-Appellant, City of Detroit's (Detroit), Application for Leave to Appeal and invited the Michigan Municipal League, the Michigan Association of Counties, Michigan AFSCME Council 25 and the Michigan State AFL-CIO to file briefs amicus curiae. Subsequently, on June 15, 2007, this Court granted Detroit's Motion for Leave to File a Supplemental Brief and directed the parties to brief two additional issues:

- 1) Whether *Metropolitan Council, No. 23 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
- 2) 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 again invited Michigan Municipal League, the Michigan Association of Counties, Michigan AFSCME Council 25 and the Michigan State AFL-CIO to file briefs amicus curiae and urged other interested parties to motion the Court for permission to file amicus curiae briefs.

Pursuant to this invitation, the Michigan Employment Relations Commission (MERC) passed the following resolution on August 27, 2007:

that the Attorney General be requested to file an *amicus* brief or other pleading in the Michigan Supreme Court in the matter of *Detroit Firefighters Association, Local 344 v City of Detroit*, No. 131463, asserting, on behalf of the Michigan Employment Relations Commission [MERC], that when a party to a compulsory arbitration proceeding under Act 312 of the Public Acts of 1969, as amended, MCL § 423.231, *et seq.*, alleges a violation of Section 13, MCL § 423.243, an action to enforce Section 13 is cognizable in a circuit court of this state for the reasons stated by the Court of Appeals in *Metropolitan Council No. 23, Local 1277 v City of Center Line*, 78 Mich App 281 (1977) and by the MERC in *City of Jackson*, 1977 MERC Lab Op 402, *Township of Meridian*, 1986 MERC Lab Op 915, *City of Flint*, 1993 MERC Lab Op 181

MERC seeks amicus status to brief the issues that were raised in the Court's Order dated June 15, 2007. MERC submits that *Metropolitan Council, No. 23, Local 1277 v City of Center Line*,¹ was correctly decided because jurisdiction to enforce Section 13 of 1969 PA 312, MCL 423.243 is vested in the circuit court. MERC also submits that the doctrine of primary jurisdiction should not be invoked because the circuit court is better suited to litigate a claim for injunctive relief under Section 13 of 1969 PA 312.

¹ *Metropolitan Council, No. 23, Local 1277 v City of Center Line*, 78 Mich App 281; 259 NW2d 460 (1977).

ARGUMENT

I. **There is a presumption that the Circuit Court has subject matter jurisdiction over a claim for injunctive relief under Section 13.**

The general jurisdiction of the circuit court is set out in Const 1963, art 6, § 3:

The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

Therefore, the circuit court has general jurisdiction over “all matters not prohibited by law. . . .” Jurisdiction is presumed in the circuit court unless the Legislature has expressly prohibited it or granted it to another court or administrative agency.²

The Legislature has also addressed the general jurisdiction of the circuit court.

MCL 600.151 states:

The judicial power of the state is vested exclusively in 1 court of justice which shall be divided into 1 supreme court, 1 court of appeals, 1 trial court of general jurisdiction known as the circuit court, 1 probate court, and courts of limited jurisdiction created by the legislature.

Further, MCL 600.605 provides:

Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

In sum, the only limits on the subject matter jurisdiction of the circuit court are those over which the Constitution or a statute grants jurisdiction to another court or administrative agency. Otherwise, it is presumed that the circuit court has subject matter jurisdiction.

² See *Bowie v Arder*, 441 Mich 23, 37-38; 490 NW2d 568 (1992) and *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

II. MERC lacks jurisdiction and authority to enjoin a violation of Act 312, Section 13.

The arbitration process involving labor disputes for policemen and firemen in Michigan is controlled by 1969 PA 312 (Act 312), MCL 423.231 *et seq* and 1995 MR 3, R 423.501-423.514. The purpose of the Act is set out in Section 1 as follows³:

It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

The Act is triggered under Section 3 when the parties to a collective bargaining agreement are “in the course of mediation of a public police or fire department employee’s dispute” and the representatives of the employee and employer can’t resolve their differences.⁴ Under these circumstances, either party “may initiate binding arbitration proceedings by prompt request. . . to the employment relations commission.”⁵ The role of MERC in these situations is limited to overseeing the arbitration process. MERC selects the “impartial arbitrator”⁶ as the Chairman of the three-person arbitration panel, which also includes the employer’s “delegate” and the employees’ “representative.”⁷ Within 15 days after the appointment of the arbitration panel by MERC, the hearings are supposed to commence before the panel.⁸ Ultimately, after the parties identify the economic issues in dispute and submit their best offer on each economic issue, the arbitration panel will conclude the hearing and the panel will issue a written opinion and order that includes findings of fact.⁹ The final order of the arbitration panel may be

³ MCL 423.231. (emphasis added.)

⁴ MCL 423.233.

⁵ MCL 423.233.

⁶ MCL 423.235(1).

⁷ MCL 423.234.

⁸ MCL 423.236.

⁹ MCL 423.238.

reviewed in circuit court “but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means.”¹⁰ During the pendency of the proceedings before the arbitration panel, Section 13 of Act 312 provides that¹¹:

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.

Finally, Act 312 is deemed “as supplementary” to the Public Employee Relations Act (PERA), “and does not amend or repeal any of its provisions. . . .”¹² Thus, MERC’s role in an Act 312 arbitration proceeding upon receiving notice of impasse is to appoint the impartial arbitrator and oversee the process. It has no other direct involvement.

A. For over thirty years, MERC and the Court of Appeals have correctly concluded that the circuit court has jurisdiction to enjoin violations of Section 13.

In *Metropolitan Council, No. 23, Local 1277 v City of Center Line*¹³, the Court of Appeals addressed the issue of whether MERC has jurisdiction to enjoin a violation of Section 13 of Act 312. There, after arbitration was invoked by the labor union under Act 312, the City announced that three policemen were going to be laid off for economic reasons notwithstanding the fact that the applicable collective bargaining agreement required layoffs only for lack of work. The union went to circuit court contending that the actions of the City violated Section 13. The court then referred the matter back to the arbitration panel. Later, the City also

¹⁰ MCL 423.242.

¹¹ MCL 423.243.

¹² MCL 423.244. See *Metropolitan Council, No. 23 & Local 1277 v City of Center Line*, 414 Mich 642, 652; 327 NW2d 822 (1982).

¹³ *Metropolitan Council, No. 23, Local 1277 v City of Center Line*, 78 Mich App 281; 259 NW2d 460 (1977).

notified the union that it was not going to pay a uniform allowance and shift differential that was provided for in the labor contract. This matter was also considered by the arbitration panel, which opined that the layoffs and the refusal of the City to pay a uniform allowance and shift differential were contrary to Section 13 of Act 312. The parties returned to circuit court, which issued orders enjoining the layoffs and ordering the payments of uniform allowance and shift differential.

On appeal, the City argued that the circuit court lacked subject matter jurisdiction over the litigation. The City also contended that under the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*, MERC had jurisdiction over the dispute of the parties. The Court of Appeals rejected these claims and held that it was proper for the circuit court to assume jurisdiction over the disagreement. In reaching this result, a unanimous Court of Appeals stated¹⁴:

Nor is there merit in the argument that the public employment relations act (PERA), MCLA 423.201 *et seq.*; MSA 17455(1) *et seq.*, rests exclusive jurisdiction over the dispute between the union and the city in the Michigan Employment Relations Commission. While the city's actions may have constituted unfair labor practices under MCLA 423.201; 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 this dispute. Const 1963, art 6, § 13. [Emphasis added.]

Thus, the Court of Appeals recognized that Act 312, which addresses labor disputes with policemen, fireman and their public employers, is separate and distinct from PERA. The Court

¹⁴ *Metropolitan Council No. 23, Local 1277*, 78 Mich App at 284.

also correctly recognized that the circuit court has jurisdiction to grant injunctive relief for violations of Section 13 of Act 312. This result is supported by thirty years of MERC precedent.

For example, in *City of Jackson v Fraternal Order of Police, Leonard Carey Lodge No. 70*,¹⁵ which was decided five months prior to the Court of Appeals decision in *Center Line*, binding arbitration was requested under Act 312 when the union and the employer had reached an impasse. An arbitrator was requested pursuant to Act 312 in order to resolve their differences over a new collective bargaining agreement. While arbitration was pending, the union contended that the employer unilaterally terminated cost of living (COLA) payments in violation of Section 13 of Act 312. Further, the union claimed that a violation of Section 13 constituted an unfair labor practice under Section 10(1)(e) of PERA. In response, the City argued that MERC lacked jurisdiction to consider a violation of Section 13 of Act 312.

The Administrative Law Judge held that the employer's action unilaterally terminating COLA payments during impasse did not constitute an unfair labor practice under PERA. The Administrative Law Judge stated¹⁶:

When Section 14 of Act 312 is read with the specific, exact specifications of what constitutes an unfair labor practice set forth in Section 10 of PERA, I conclude that the Legislature did not intend to create a new unfair labor practice by the enactment of Act 312.

The supplementary aspect of Act 312 is limited to the resolution of disputes that cannot be resolved by the collective bargaining process provided for in PERA. If the specific prohibition of change of conditions of employment without mutual consent of Section 13 of Act 312 is violated, it would seem this violation should be remedied by a court or by the Act 312 arbitrator by retroactive restoration. Either method of remedy would be more expenditures [expeditious] than the PERA unfair labor practice route with a hearing before an ALJ, appeal to this Commission, and application to the Court of Appeals in order to obtain enforcement of any resulting order. [Emphasis added.]

¹⁵ *City of Jackson v Fraternal Order of Police, Leonard Carey Lodge No. 70*, 1977 MERC Lab Op 402.

¹⁶ 1977 MERC Lab Op at 406.

Thus, the ALJ concluded that a violation of Section 13 of Act 312 should be remedied in the circuit court or by the Act 312 arbitration panel. Because time is of the essence, MERC lacked the procedures to expeditiously to hear and decide a request for injunctive relief.

Similarly, in *Township of Meridian v Technical, Professional and Office Workers Association of Michigan*,¹⁷ the labor union and the Charter Township Fire Department had reached an impasse and invoked Act 312 arbitration. While arbitration was ongoing, the employer posted the position of Fire Marshal. The union then filed with MERC an unfair labor practice charge contending that the employer had changed the conditions of employment during the pendency of proceedings before the Act 312 arbitration panel in violation of Section 10(1)(e) of PERA and in violation of Section 10 of Act 312. MERC concluded that it did not have the authority to enjoin a violation of Section 13 of Act 312 and stated that the “Legislature did not intend a violation of Section 13 to constitute an unfair labor practice under Section 10 of PERA.”¹⁸ MERC reasoned that the statutory purpose of Section 13 “is to preserve the integrity of the arbitration process by preserving the status quo during the arbitration.”¹⁹ This purpose, according to MERC, “can be met by an expeditious hearing and injunctive relief issued by a circuit court.”²⁰ Finally, MERC held that it lacked contempt power to enforce a final order “unlike the Circuit Court. . . .”²¹

Further, in *City of Flint v Flint Police Officers Association*,²² MERC affirmed an Administrative Law Judge’s decision and recommended order holding that MERC lacked subject

¹⁷ *Township of Meridian v Technical, Professional and Office Workers Association of Michigan*, 1986 MERC Lab Op 915.

¹⁸ 1986 MERC Lab Op at 918.

¹⁹ 1986 MERC Lab Op at 918.

²⁰ 1986 MERC at 918-919.

²¹ 1986 MERC Lab Op at 919.

²² *City of Flint v Flint Police Officers Association*, 1993 MERC Lab Op 181.

matter jurisdiction to adjudicate a claim that an employer committed an unfair labor practice under Section 13 of Act 312. In that case, the employer implemented a volunteer police force while Act 312 arbitration was pending. The union then filed with MERC an unfair labor practice charge contending that the actions of the employer were in violation of Section 10(1) of PERA.²³ The Administrative Law Judge summarized the issue as to “whether the MERC has jurisdiction to interpret and enforce Section 13 of Act 312.”²⁴

The Administrative Law Judge concluded that MERC did not have jurisdiction to hold that the City “violated PERA by creating a volunteer police organization while an Act 312 petition was pending.”²⁵ The ALJ also held that MERC possessed jurisdiction over unfair labor practices where the unfair labor practices were committed prior to the institution of the Act 312 arbitration proceedings. However, once a party invokes an Act 312 proceeding, the circuit court enjoins violations by the parties.

Thus, for over thirty years, MERC has consistently construed Section 13 in the same manner. MERC’s longstanding administration interpretation of Section 13 since 1977 is entitled to great weight.²⁶ In *Oakland Board of Education v Superintendent of Public Instruction*,²⁷ this Court quoted with approval from the United Supreme Court in *United States v Moore*²⁸:

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

²³ MCL 423.210(1).

²⁴ *City of Flint v Flint Police Officers Association*, 1993 MERC Lab Op at 183.

²⁵ *Id.* at 184.

²⁶ *Magreta v Ambassador Steel Co*, (On Rehearing), 380 Mich 513, 519; 158 NW2d 473 (1968).

²⁷ *Oakland Board of Education v Superintendent of Public Instruction*, 401 Mich 37, 41; 257 NW2d 73 (1977).

²⁸ *United States v Moore*, 95 US 760, 763; 25 L Ed 588 (1878).

Therefore, the longstanding statutory interpretation rendered by MERC of Section 13 should be given deference by this Court. Moreover, a procedure that has served the public well for more than thirty years should not be changed in the absence of a statutory amendment.

III. The primary jurisdiction doctrine does not support referral to MERC of a claim for injunctive relief under Section 13.

In *Travelers Insurance Co v Detroit Edison Company*, this Court set out the doctrine of primary jurisdiction in the following manner²⁹:

The doctrine of primary jurisdiction is grounded in the principle of separation of powers. . . .

The doctrine of primary jurisdiction also reflects practical concerns regarding respect for the agency's legislatively imposed regulatory duties. Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency. . . .

“Primary jurisdiction’ . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.” *United States v Western P R Co*, 352 U.S. 59, 63-64; 77 S. Ct. 161; 1 L. Ed. 2d 126 (1956) (emphasis added), citing *General American Tank Car Corp v El Dorado Terminal Co*, 308 U.S. 422, 433; 60 S. Ct. 325; 84 L. Ed. 361 (1940). . . .]

“The doctrine reflects the courts’ recognition that administrative agencies, created by the Legislature, are intended to be repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field.” Baron, *Judicial review of administrative agency rules: A question of timing*, 43 Baylor L R 139, 158 (1991). Thus whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency “necessarily depends upon the agency rule at issue and the nature of the declaration being sought in the particular case.” *Id.* at 159.

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for existence of the doctrine are

²⁹ *Travelers Insurance Co v Detroit Edison Company*, 465 Mich 185, 196-200; 631 NW2d 733 (2001). (emphasis added.)

present and whether the purposes it serves will be aided by its application in the particular litigation.” [*Western Pacific, supra* at 64.] [emphasis added.]

Therefore, there is no hard and fast rule or “fixed formula” for applying primary jurisdiction. The overriding consideration is whether the purpose that the doctrine serves should be applied to the facts of this case when MERC is not suited to provide an expeditious hearing and injunctive relief.

The circuit court, however, is fully equipped to properly handle a request for injunctive relief. Under MCR 3.310(B), a temporary restraining order under certain circumstances may be granted without notice to the other party. A motion to dissolve a temporary restraining order may be heard on 24 hours notice.³⁰ A hearing on a motion may be heard within seven days after the motion is filed.³¹ If a preliminary injunction is granted, the circuit court must immediately schedule a pre-trial conference and hold a trial on the merits within six months after the injunction is issued.³²

Conversely, MERC is simply not suited to provide an expeditious hearing and injunctive relief in an unfair labor practice proceeding alleging a violation of Section 13 of Act 312. Under Section 16 of PERA,³³ upon the filing of a complaint, an administrative law judge conducts a hearing and prepares a recommended decision and order.³⁴ Any party to the proceeding may file exceptions to the administrative law judge’s proposed decision within 20 days of service of the ALJ’s proposal.³⁵ Within ten days after service of the exceptions, cross exceptions may be filed

³⁰ MCR 3.310(B)(5).

³¹ MCR 2.119(C)(4).

³² MCR 3.310(A)(5).

³³ MCL 423.216

³⁴ MCL 423.216(a) and Rule 423.175.

³⁵ Rule 423.176(2).

by a party.³⁶ The Commission may receive further evidence and permit oral argument.³⁷ Unlike the circuit court, MERC lacks the authority to enforce its orders. Under Section 16(d) of PERA,³⁸ a party must petition the Court of Appeals “for the enforcement of the order and for appropriate temporary relief or restraining order. . . .”

The suggestion that MERC should be required to hear and adjudicate claims for injunctive relief under Section 13 of Act 312 is contrary to the intent of the Act which is “to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes”³⁹ in order to preserve “the vital character of police and fire services.”⁴⁰ This goal will be thwarted if primary jurisdiction is invoked and MERC is required to hear and adjudicate claims for injunctive relief under Section 13 because MERC, unlike the Circuit Court, is not in a position to provide an expeditious procedure to preserve public safety. For these reasons, the use of judicial resources is best served by following thirty years of precedent that holds that the circuit court possesses the authority to hear and decide claims for injunctive relief under Section 13 of Act 312.

³⁶ Rule 423.176(6).

³⁷ Rule 423.176(9) and Rule 423.176.

³⁸ MCL 423.216(d).

³⁹ MCL 423.231.

⁴⁰ *Metropolitan Council, No. 23 & Local 1277 v City of Center Line*, 414 Mich at 651, quoting *Fire Fighters Union Local No. 412, IAFF v Dearborn*, 394 Mich 229, 279; 231 NW2d 226 (1975).

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Amicus Curiae Michigan Employment Relations Commission respectfully requests this Honorable Court to conclude that the Court of Appeals correctly held in *Metropolitan Council, No. 23, Local 1277 v City of Center Line*, 78 Mich 281; 259 NW2d 460 (1977) that jurisdiction to enforce Section 13 of Act 312 is reposed in the circuit court and that MERC does not have primary jurisdiction to enforce Section 13.

Respectfully submitted,

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