

IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
JUDGE SCHUETTE, PRESIDING; JUDGES COOPER AND BANDSTRA

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

APPELLEE'S ANSWER TO THE SUPPLEMENTAL BRIEFS OF
APPELLANT AND APPELLANT'S AMICI CURIAE

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I. OVERVIEW

At its core, the instant case (including the question of primary jurisdiction) is about a single issue – whether the circuit court had the jurisdiction to issue the injunction necessary to enforce section 13 of Act 312. The answer is clear:

- **Act 312, M.C.L. 423.231 et seq. says yes.** See, M.C.L. 423.231 et seq.
- **The Legislature said yes.** *Id.* (leaving Act 312 unamended as to the issue of jurisdiction for almost four decades following numerous circuit court cases in which injunctions issued to maintain the *status quo* as required by section 13 of Act 312)¹;
- **The People of the State of Michigan say yes.** See, Const 1963, art 6, § 13 (granting the circuit court original jurisdiction in all matters not otherwise prohibited by law);
- **The Michigan Employment Relations Commission (“MERC”) says yes.** See, e.g., *City of Flint*, 1993 MERC Lab. Op. 181; *Township of Meridian*, 1986 MERC Lab. Op. 915; *City of Detroit (Fire Department)*, 1981 MERC Lab. Op. 718; *City of Grosse Pointe (Fire Department)*, 1977 MERC Lab. Op. 689; *City of Lincoln Park*, 1977 MERC Lab. Op. 679; *City of Jackson*, 1977 MERC Lab Op 402, 405-506;
- **The Public Employment Relations Act, M.C.L. 423.201 et seq (“PERA”), says yes.** See M.C.L. 423.216 (granting MERC jurisdiction to resolve unfair

¹ See, e.g., *Detroit Fire Fighters Ass’n., Local 344, IAFF, AFL-CIO v. City of Detroit*, Case No. 89-924821-CL; *Detroit Fire Fighters Ass’n., Local 344, IAFF, AFL-CIO v. City of Detroit*, Case. No. 79-907070-CL; *Detroit Fire Fighters Ass’n., Local 344, IAFF, AFL-CIO v. City of Detroit*, Case. No. 87-716736-CL; *Detroit Police Officers Ass’n. v. City of Detroit*, Case. No. 02-204921-CL. Appellant’s Appendix at 234a-243a.

labor practices as defined in M.C.L. 423.210) and M.C.L. 423.210 (defining unfair labor practices in such a manner that *excludes* violations of section 13 of Act 312).

- **The City of Detroit says yes.** See, City's Brief at 2, n.9 (admitting the circuit can issue Act 312 injunctions).
- **The Circuit Court said yes.** See Preliminary Injunction, October 31, 2005 (the Injunction). Appellant's Appendix at 519a-520a.
- **The Michigan Court of Appeals said yes.** See *Detroit Fire Fighters Ass'n. v. City of Detroit*, 271 Mich. App. 457, 722 N.W.2d 705 (2006)

As explained herein, and in each previous brief and argument to date, this Honorable Court should also answer yes.

II. INTRODUCTION

On June 15, 2007, this Court granted the City's motion to file a supplemental brief and, *sua sponte*, directed the parties:

To file additional supplement briefs...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...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).

Order, June 15 2007. In addition, the Court invited several other organizations to file *amicus curiae* briefs. On August 22, 2007, briefs were filed by the Detroit Fire Fighters Association ("DFFA") and the City of Detroit ("City"). The Michigan Municipal League and Michigan Association of Counties (collectively, "the League") filed a single, combined brief on behalf of the City and the Michigan State AFL-CIO filed on behalf of the DFFA. Although additional oral argument has been scheduled in this case, the

DFFA respectfully submits this brief in response to the arguments propounded by the City and the League because such arguments ignore the law and the facts of this case (and, in some instances, the Court's Order) and therefore cannot be permitted to stand unchallenged.

This brief will not simply repeat the DFFA's legal analysis previously supplied to the Court. It will, however, set the arguments in context of what Act 312 is (and is not) and will detail why every argument proposed by the City and its supporting *amici curiae* must be rejected, wholly in accordance with the relevant portions of the Public Employment Relations Act, M.C.L. 423.201 *et seq.* ("PERA") and the Police and Fire Department Compulsory Arbitration Act, M.C.L. 423.231 *et seq.* ("Act 312").

III. ARGUMENT

In contrast to PERA, Act 312, does not address the collective bargaining process. Rather, Act 312 is the tool designed and enacted by the Legislature to resolve disputes with police and fire fighters related to mandatory bargaining subjects **when the bargaining process fails**. Compulsory arbitration ensures a balance of power between the parties and an effective arbitration process.² This distinction between PERA and Act 312 is vital – both in practice, generally, and in this case.

Section 13 of Act 312 is designed to protect the integrity of the arbitration process. It focuses on the process – not on the collective bargaining agreement, and provides in relevant part:

During the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed

² It also ensures that critical public safety services will not be disrupted by strikes that endanger both the public and the public safety personnel.

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.

MCL 423.243. Notably, section 13 is implicated only in very limited circumstances. First, the parties must have failed to reach agreement on all of the terms of a new contract, thereby requiring arbitration to complete the process. Second, it is only relevant if one party attempts to change terms and conditions of employment (the mandatory bargaining subjects) **after** a petition for arbitration has been filed by a party and before a valid arbitration award has issued. In fact, most cities and their police and fire fighters reach agreement without resorting to arbitration. Moreover, when such proceedings are necessary, they are generally brief as Act 312 limits the time periods for each step of the process (with such time limits extended only by agreement of **both** parties).³

In practice, section 13 of Act 312 is implicated in a very limited number of cases. It is, however, vital to the integrity of the arbitration process. Moreover, it is vital to recognize that, while Act 312 supplements PERA, it was enacted as a separate and distinct statutory scheme. While both Acts address what may appear to be similar actions, each addresses such actions under substantially different circumstances and requires different processes appropriate to those circumstances. To *wit*, PERA permits MERC to resolve unfair labor practices when there are no Act 312 proceedings pending. Under Act 312, however, MERC is authorized to handle basic administrative and recordkeeping duties only, while the arbitration panel is vested with the power to determine the terms of the collective bargaining agreement.

³ Although the arbitration proceedings between the City and the DFFA have been extensive, this does not represent the norm. Act 312, however, must be interpreted on the basis of what the law requires – not what has happened in Detroit.

It bears repeating that the circuit court's role in section 13 cases is not to settle the substantive terms and conditions of employment between the parties – that is the role of the arbitration panel that will necessarily exist (or at least be in the formation process) before section 13 of Act 312 may be implicated at all. Rather, the trial court's job is merely to determine whether one party has altered the *status quo* related to terms and conditions of employment – or that there is a **question about whether one party has altered the *status quo* related to terms and conditions of employment**, thereby requiring a final determination by the arbitration panel. The only issue before the trial court is whether an injunction should issue. Notably, of course, the plain language of PERA prohibits the MERC from issuing injunctions, so the circuit court must be a participant in this process.

In this case, the circuit court found that there was a serious question regarding the impact of the City's plan on fire fighter safety. The trial court left any further substantive determination to the arbitration panel – completely in accordance with the authority granted to the panel by the Legislature. Even the City recognizes that the circuit courts properly issue injunctive relief in these cases. City's Brief at 2, n.9. In fact, that is all this case is about. The circuit court got it right. The Court of Appeals unanimously affirmed. This Court should also affirm the trial court's decision.

A. The City Misrepresented Both the Law and the Facts of this Case.

1. The Circuit Courts Have Jurisdiction Pursuant to the Michigan Constitution.

Despite the City's attempt to claim otherwise, the circuit court's jurisdiction is not predicated on a specific grant of power by the Legislature. City's Brief at 5-6. Rather, the Michigan Constitution grants the circuit court extremely broad jurisdiction, including

jurisdiction in the case at bar: **“The circuit court shall have original jurisdiction in all matters not prohibited by law...”** Mich. Const. 1963, art. 6, § 13 (emphasis added). The Legislature’s decision to identify partial aspects of the circuit court’s role under Act 312 does not rob the circuit court of its constitutional jurisdiction. Rather, the circuit court’s jurisdiction is wholly in accordance with the Michigan Constitution. It is also wholly in accordance with the provisions of Act 312 and PERA.

2. Act 312 Is A Separate And Distinct Statute from PERA.

The City makes (far too) much of the fact that section 14 of Act 312 provides that Act 312 is “supplementary” PERA. The City, however, asks this Court to ignore that the Legislature enacted Act 312 as a **separate statute** from PERA. Thus, by its very existence, Act 312 must bring **something different or more** to the issue of labor relations between the City and its fire fighters and police. PERA and Act 312 obviously are not “a unified provision.” City’s Brief at 5.

The City argues that because both statutes contain the phrase “wages, hours and other terms and conditions of employment” they both address mandatory bargaining subjects. City’s Brief at 3-4. The City is correct.⁴ The City, however, argues that because both address mandatory bargaining subjects, then both require the same processes for dispute resolution. *Id.* The City is (absurdly) wrong. The City also makes the ludicrous claim that section 13 is “textually indistinguishable” from section 15 of PERA. The City is wrong again. Nothing requires the Legislature to treat mandatory bargaining subjects the same under vastly differing circumstances.

⁴ The City did not get this aspect of the issue entirely correct. It continues to confuse wages, hours and other terms and conditions of employment” with provisions of the collective bargaining agreement. Although a CBA does contain many terms and conditions of employment, some, such as fire fighter safety, may exist independently of the written document.

With Act 312, the Legislature enacted a separate statute requiring that police and fire fighter collective bargaining disputes be resolved with compulsory arbitration. As such, Act 312 supplements – **adds to** – the body of public-sector labor law begun in PERA. It does not merely repeat what PERA says – nor may it be interpreted as such:

- Section 15 of PERA requires and defines collective bargaining to form collective bargaining agreements between public employers and employees. Section 13 of Act 312 prohibits changes in terms and conditions of employment during the pendency of compulsory arbitration proceedings. Clearly, the two are not “textually indistinguishable!”

In this case, Act 312 does not require, by its terms or implication, that dispute resolution processes required under PERA be required under Act 312. Nothing in the Legislature’s use of the word “supplementary” defines whether the supplemental nature of Act 312 is substantive or procedural. Moreover, section 1 demonstrates the procedural underpinnings of Act 312, to *wit*, to “afford an alternate, expeditious, effective and binding **procedure** for the resolution of disputes.” M.C.L. 423.231 (emphasis added). In fact, the Legislature enacted two statutes with different provisions:

- Under PERA, MERC has jurisdiction to decide and remedy unfair labor practice charges exclusively as outlined in section 16 of PERA. PERA does not give MERC jurisdiction to resolve any issues arising under section 13 of Act 312. M.C.L. 423.216 (Violations of §423.210 as unfair labor practices, remedies, procedures).
- PERA specifically defines (and limits) unfair labor practices as violations of section 10 of PERA. A violation of section 13 of Act 312 is not defined as

an unfair labor practice in section 10 of PERA. M.C.L. 423.210 (Prohibited Conduct).

“The cardinal rule of statutory construction is to identify and to give effect to the intent of the Legislature.” *County of Wayne v. Dir. of the Mich. Dep’t of Corr.*, 450 Mich. 884, 885-886, 540 N.W.2d 678 (Mich. 1995) citing *Mull v. Equitable Life*, 444 Mich. 508, 514, n.7; 510 N.W.2d 184 (1994); *Coleman v. Gurwin*, 443 Mich. 59, 65; 503 N.W.2d 435 (1993). Courts avoid any interpretation of a statute that renders the language of the statute meaningless. *Hoste v. Shanty Creek Mgt., Inc.*, 459 Mich. 561, 574; 592 N.W.2d 360 (1999) *rehearing denied* 460 Mich. 1201, 598 N.W.2d 336 (1999); *Nelson v. Transamerica Ins. Services*, 441 Mich. 508, 513-514; 495 N.W.2d 370 (1992). Rather, “every word of a statute should be given meaning, and no word should be treated as surplusage or rendered nugatory if at all possible.” *Hoste, supra*, at 574 citing *State Bd. of Ed. v. Houghton Lake Community Schools*, 430 Mich. 658, 671; 425 N.W.2d 80 (1988). For this reason alone, the Court must find that section 13 of Act 312 has some meaning both different and independent of section 16 of PERA.

To presume that a violation of the *status quo* provision in section 13 of Act 312 is simply an unfair labor practice under PERA is to presume that section 13 of Act 312 has no meaning of its own, separate and distinct from PERA. Such a presumption renders section 13 of Act 312 meaningless and may not be made.⁵ To define a violation of the *status quo* under section 13 of Act 312 as an unfair labor practice under section 16 of PERA is to determine that the Legislature was “wrong” when it specifically defined unfair labor practices as “violations of the provisions of section 10” of PERA. M.C.L. 423.216.

⁵ In fact, we must presume that if the Legislature wanted to make a violation of the *status quo* under section 13 of Act 312 an unfair labor practice under section 16 of PERA it would have – either by stating so in Act 312 or by amending section 10 of PERA to include the *status quo* violation. It did neither.

Such a determination amends both Act 312 and PERA and is outside of the Court's authority.

Finally, the circuit court's jurisdiction to grant injunctive relief to maintain the *status quo* takes nothing away from MERC – which has never had any substantive authority over the compulsory arbitration process or the authority to issue injunctions. A violation of the *status quo* under section 13 of Act 312 simply is not an unfair labor practice under PERA. Thus the two need not, and should not, be resolved by the same processes.

3. The City Mistakenly Argues for “Exhaustion of Administrative Remedies” Rather than “Primary Jurisdiction”

In its brief, the City argues that “a violation of section 13 [of Act 312] must be in the form of an unfair labor practice as it is referenced in Act 312 and defined in PERA...” City's Brief at 2. As an initial matter, Act 312 never references unfair labor practices. Never. Regardless, the City also claims that “an allegation of a violation of section 13 of Act 312 must allege an unfair labor practice.” City's Brief at 8. Further undermining its own argument, the City also admits that the circuit courts may issue injunctive relief “in appropriate situations...to enjoin alleged violations of section 13.” City's Brief at 2, n.9.

Taken together, it becomes apparent that the City is attempting to convince this Court that an unfair labor practice charge is a prerequisite to requesting injunctive relief **from the circuit court** for a violation of section 13 of Act 312. Taken together, it becomes apparent that the City is requiring some “exhaustion of administrative remedies” process before the injured party may seek relief from the circuit court. In fact, the City confirmed such a position during the first oral argument in this case. Transcript,

Campbell Argument at pp. 4-5. Thus, the City's position supports the exhaustion doctrine – not the doctrine of primary jurisdiction as articulated in the Court's Order.

This Court articulated the difference between primary jurisdiction and exhaustion of administrative remedies in *Travelers Insurance*:

“Exhaustion” applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. “Primary jurisdiction,” on the other hand, 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.

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. 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."

Travelers Ins. Co. v. Detroit Edison, 465 Mich. 185, 197-98 (2001) (Bold emphasis added) (citations omitted). The City fails to comprehend this critical distinction.

The City's argument requires this Court to find that there is an "exhaustion" requirement preceding the circuit court's jurisdiction. That issue is not before the Court and may not be raised in this Court at this point in the proceedings. Moreover, that issue is non-responsive to the Court's Order. The City's argument must be ignored by the Court.

4. Section 13 Applies to All Mandatory Bargaining Subjects – Not Just Those Embodied in the Collective Bargaining Agreement.

The City attempts to confuse this Court by accusing the DFFA of arguing that section 13 of Act 312 applies to any subject – not just mandatory bargaining subjects.

The City must stop putting words in the DFFA's "mouth." To be clear, the DFFA does not, nor has it ever, claimed that section 13 is applicable to anything other than mandatory bargaining subjects. Section 13 of Act 312 is applicable to all mandatory bargaining subjects – and only mandatory bargaining subjects. This is all the DFFA has ever argued.

The City next errs by claiming that all mandatory bargaining subjects are memorialized in collective bargaining agreements and that section 13 of Act 312 only applies to such contract provisions. Such an argument ignores the plain language of the Act requiring maintenance of the *status quo* related to all "existing wages, hours and other conditions of employment" – **not** to existing terms of the collective bargaining agreement. Mandatory bargaining subjects may be contained in the collective bargaining agreement but also may arise in some other manner, such as long term practices of the parties.

By way of example, and relevant to the instant case, fire fighter safety is a mandatory bargaining subject. Not even the City denies this basic fact. Fire fighter safety, however, is not addressed by a specific provision of the collective bargaining agreement. Rather, it is a condition of employment implicated by many other terms and conditions of employment – again, whether or not those conditions are specifically embodied in the collective bargaining agreement or created by the long-term practices of the parties. Regardless of origin, however, the *status quo* provision in section 13 of Act 312 applies to fire fighter safety and all other mandatory subjects of bargaining.

For each of the above reasons, the City's arguments must be rejected in their entirety. The *amici curiae* brief, supporting the City's position, suffers the same fate.

B. The League Misrepresented Both the Law and the Facts of this Case.

1. This Court Did Not Raise the Subject of Exclusive Jurisdiction.

The Court's June 15, 2007 Order was clear and unambiguous. The subject to be addressed was whether the MERC has primary jurisdiction to enforce section 13 of Act 312. To ensure clarity, the Court directed all parties and potential *amici curiae* to *Travelers Insurance*, a case articulating when **primary** jurisdiction should vest in an administrative agency. The League, however, ignored the Court's Order and argued that PERA and the Labor Mediation Act (the "LMA" addressing **private** sector labor law) somehow vested **exclusive** jurisdiction to enforce Act 312 in the MERC. That issue is not before the Court. The League's argument must be ignored. Assuming, *arguendo*, the League's argument is permissibly included in the brief, the argument also must fail on the merits.

2. Enforcement of Section 13 of Act 312 Does Not Require MERC's Expertise.

Like the City before it, the League argues that MERC is "the sole state agency charged with the interpretation and enforcement" of public sector labor relations, because it is a "highly specialized and politically sensitive field of law." League's Brief at 4 quoting *Kent County Deputy Sheriff's Assn. v. Kent County Sheriff*, 238 Mich. App. 310, 313; 605 N.W.2d 363 (1999). What the League's argument ignores is that section 13 disputes **do not** implicate overriding labor law legal principles. Section 13 disputes do not implicate major public policy. Section 13 disputes do not implicate some detailed regulatory scheme (the only circumstance implicating primary jurisdiction). Rather, section 13 disputes implicate only the *status quo* related to terms and conditions of employment between two parties while such parties are engaged in binding arbitration.

The disputes are factual and, as such, different in each and every employer/employee relationship. There is absolutely no need for MERC's expertise – particularly as section 13 disputes merely require a circuit court to issue an injunction if the *status quo* has been disturbed between the parties (or there is adequate evidence of a disturbance requiring additional scrutiny by the arbitration panel).

3. Again, the Legislature's Use Of The Word "Supplementary" Does Not Function To Vest Jurisdiction In MERC.

Like the City, the League makes much of the term "supplementary." League's Brief at 5-6. Like the City, the League propounds an interpretation that renders Act 312 meaningless – nothing more than a regurgitation of PERA. In fact, according to the League, Act 312 exists only to achieve the goals of PERA. League's Brief at 6. That is, all of the provisions of Act 312 say nothing more than "PERA applies to police and fire fighters." Such an interpretation is both absurd and impermissible.

As an initial matter, the League claims that, as a "supplement" to Act 312, it must "make up for a deficiency, or extend or strengthen the whole." League's Brief at 5 quoting *The American Heritage Dictionary of the English Language* (4th Ed. 2004). The League's brief, however, begs any number of questions: does Act 312 make up for a substantive or procedural deficiency? Does Act 312 "extend" PERA to police and fire fighters or does it ensure that where PERA adequately addresses the collective bargaining needs of most public employees, additional procedures (perhaps not under the exclusive jurisdiction of MERC) are required for police and fire fighters? Does Act 312 "strengthen" PERA merely (and perhaps pointlessly) by reiterating that the requirements of PERA apply to police and fire fighters or does it "strengthen the whole" body of public sector labor law by defining special procedures to address the special

needs of public safety employees. Without answering any of these questions, the League makes a remarkable leap to conclude that “Act 312 merely provides another method for achieving the goals of PERA.” Nothing in Act 312 or PERA supports this conclusion. The League is wrong.

As this Court explained more than thirty years ago, “Compulsory arbitration is a practical response to impasse experienced from time to time in collective bargaining where the public welfare cannot endure the impact of a work stoppage while awaiting the resolution of problems **through normal negotiations**. *Dearborn Fire Fighters Union v. City of Dearborn*, 394 Mich. 299, 292-93, 231 N.W.2d 226 (1975). If there is a deficiency in PERA, the deficiency must be that is no dispute resolution process adequately tailored to resolve police and fire fighter disputes when normal negotiations fail. This conclusion is abundantly clear from the legislature’s (unambiguously) stated purpose of Act 312:

Sec. 1. 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 moral 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.**

M.C.L. 423.231 (emphasis added).

Since the enactment of Act 312 in 1969, police and fire fighters have engaged in compulsory arbitration to resolve disputes with their public employers. Since 1969, police and fire fighters have looked to the circuit courts to enforce the *status quo* requirement in section 13 of Act 312 and protect the integrity of the arbitration process. Most importantly, since the enactment of Act 312 in 1969, there have been **no** police or

fire fighter strikes in the State of Michigan. Where PERA failed, Act 312 succeeded. Where the MERC was ineffective, the circuit courts have been highly effective.⁶

Furthermore, the Legislature mentions PERA in section 14 of Act 312 only. Nowhere does the Legislature claim that Act 312 is designed to achieve PERA's goals. Quite the contrary, the Legislature clearly defined Act 312 as a new and different form of dispute resolution specifically designed to address dispute resolution related to police and fire fighters, when collective bargaining (under PERA) fails. Act 312 does not replace collective bargaining but, rather, provides an entirely new and distinct procedure for dispute resolution – by its plain language. As such, there is no legal basis for this Court to impose PERA's goals and requirements on the goals and processes of Act 312. There is no legal basis to vest exclusive jurisdiction to enforce section 13 of Act 312 in the MERC. Indeed, there is no legal basis to presume that the MERC can better effectuate Act 312's goal – as articulated by the Legislature – more effectively than the circuit court with the assistance of an experienced and educated arbitration panel.

4. The League's Syllogism Fails.

According to the League, a syllogism can be used to “prove” MERC has exclusive jurisdiction to enforce section 13 of Act 312, as follows:

1. MERC has exclusive jurisdiction to enforce PERA;
2. **Act 312 is supplementary to PERA;**
3. Therefore, MERC has exclusive jurisdiction to enforce Act 312.

Simply put, the League's “syllogism”...isn't a syllogism. “A syllogism is a statement of **logical relationship**.” GARDNER, JAMES A., *Legal Argument* at §1.2, p. 4,

⁶ The need for an **expeditious** resolution of disputes with public safety employees is critical, where the stakes are life and death. Such speed is not critical for other public employees whose employment is governed solely by PERA – or by PERA's more laborious fact finding and review processes.

The Michie Co. 1993. Importantly, it “provides the requisite appearance of certainty.”
Id. at § 1.1 at p. 4. A classic example is:

1. All men are mortal.
2. Socrates is a man.
3. Therefore, Socrates is mortal.

Id. By comparing this (valid) syllogism with the League’s (invalid) attempt, the League’s failure becomes clear – premise number 2 (“Act 312 is supplementary to PERA”) is wholly inadequate to support the conclusion (MERC has exclusive jurisdiction to enforce Act 312). In fact, to reach the League’s conclusion, the syllogism would have to read as follows:

1. MERC has exclusive jurisdiction to enforce PERA;
2. **Act 312 is PERA;**
3. Therefore, MERC has exclusive jurisdiction to enforce Act 312.

Of course, Act 312 **is not** PERA. It is a separate and distinct statute, enacted as such in the discretion of the Legislature. Moreover, we are obligated to presume that if the Legislature simply wanted to amend or extend PERA, it would have amended or extended PERA. It did not. Therefore MERC does not have exclusive jurisdiction to enforce Act 312 – at least not on the basis of its jurisdiction to enforce PERA and the presence of the term “supplementary.” In any event, one is not going to resolve the intent of the Michigan Legislature in 1969 by playing word games regarding how many angels can dance on the head of the “supplementary” pin.

5. The League’s Exclusive Jurisdiction Argument Is Predicted On Numerous Other Legal and Factual Misrepresentations and Conclusions.

The League’s jurisdiction argument makes numerous other errors:

- “[A] public employer is only prohibited from implementing a personnel decision during the pendency of Act 312 arbitration if an applicable collective bargaining agreement clearly and expressly prohibits the planned action.” League Brief at 2.

No. Section 13 of Act 312 specifically requires maintenance of “existing wages, hours, and other conditions of employment” but **never** mentions the collective bargaining agreement.

- An employer does not need to bargain to impasse or agreement before implementing its decision. League’s Brief at 2.

No. This is, of course, the heart of Act 312. An employer may not implement a decision related to a mandatory bargaining subject before or at impasse (“without consent”) if the employees are fire fighters or police. Rather, the issue must be submitted to Act 312 compulsory arbitration for resolution and the *status quo* related to that (and all) issues must be maintained until a valid award issues.

- The Legislature “gave MERC the jurisdiction to govern the administration” of Act 312. League’s Brief at 4.

No. In fact, the Legislature specifically limited MERC’s role in Act 312 to assisting in the selection of the chair of the Act 312 arbitration panel and recordkeeping.

- The circuit court’s role is more limited with respect to Act 312 than PERA. League’s Brief at 6.

No. This claim is particularly egregious as the League regularly and often claims that the MERC has exclusive (and apparently sole) jurisdiction over PERA. Moreover, Act 312 does not limit the role (or jurisdiction) of the circuit courts in any way, whatsoever. Mich. Const. 1963, art. 6, § 13.

- The Legislature did not “carve out a role for the circuit courts with respect to section 13 disputes...” League’s Brief at 7.

No. The only possible relief available to maintain the *status quo* is injunctive relief. The Legislature, however, has specifically denied the MERC the power to issue injunction relief.⁷ See, M.C.L. 423.216 Thus, enforcing section 13 of Act 312 must be within the jurisdiction of the circuit court. Mich. Const. 1963, art. 6, § 13.

- “MERC has erroneously declined jurisdiction of section 13 disputes.” League’s Brief at 9-13.

No. For nine pages, the League claimed that the MERC must have exclusive jurisdiction because it has the particularized knowledge and expertise to address complex labor issues. Clearly, then, the MERC must have the particularized knowledge and expertise to determine when its knowledge and expertise are necessary – that is to determine its own jurisdiction. Indeed, unlike factual issues related only to a specific collective bargaining agreement, jurisdiction is exactly the type of legal

⁷ In fact, PERA requires MERC to ask the State’s Attorney General to ask the circuit court for an injunction. This can hardly be the “expeditious” procedure the Legislature had in mind, to stave off the dire and deadly consequences of police and fire fighter strikes, when it enacted Act 312.

issue the MERC should and has decided – in favor of the circuit court and arbitration panel’s jurisdiction to enforce section 13 of Act 312.

The Legislature presumably has been aware of the *Center Line I* decision, as well as MERC decisions beginning with *City of Jackson*, 1977 MERC Lab. Op 402 for thirty years. Moreover, the Legislature has amended both PERA and Act 312 numerous times during the intervening decades since *Center Line I* and similar MERC decisions were decided. It did not amend either Act with regards to jurisdiction to enforce Act 312. Presumably, the trial courts, the Court of Appeals and MERC interpreted Act 312 in accordance with the Legislator’s intent for Act 312 – including vesting jurisdiction to enforce section 13 of Act 312 in the circuit courts.

6. The League’s Primary Jurisdiction Argument Improperly Presumes A “Regulatory Scheme” Governs Act 312 Disputes.

Like the City, the League misses the salient point of primary jurisdiction – to uniformly enforce a particular regulatory scheme. League’s Brief at 15-17; *but see; Travelers Ins. Co. v. Detroit Edison Co.*, 465 Mich. 185, 189; 631 N.W.2d. 733 (2001); *Rinaldo’s Constr. Corp. v. Michigan Bell Tel. Co.*, 454 Mich. 65; 559 N.W.2d 647 (1997) (each requiring the existence of a detailed regulatory scheme). In fact, primary jurisdiction only applies when the resolution of the issue requires interpretation and uniform implementation of a detailed **regulatory scheme**, such as in the area of public utilities (telephone, energy, etc.). *Id.* No such regulatory scheme exists in labor law and, most certainly, no regulatory scheme is implicated in a dispute involving the **factual** aspects of the terms and conditions of employment as they exist between an individual public employer and its fire fighters or police. Rather, the facts are different in every case.

The League's Brief is particularly confused on this point, claiming that a section 13 decision requires extensive analysis of the factual terms of the parties' relationship and acknowledging that the role of the arbitration panel is to determine "the terms of a collective bargaining agreement when the employer and union are unable to do so." League's Brief at 17. In fact, the arbitration panel's job is to understand the entire relationship between the parties, including the balance and interplay of the various terms and conditions of employment. MERC has no particularized knowledge related to individual collective bargaining agreements and/or the individualized relationships between the parties.

Specifically, the MERC has no particular expertise related to Detroit fire fighters' terms and conditions of employment. It has no particular expertise related to the Grand Rapids or Muskegon or Lansing or Iron Mountain fire fighters' terms and conditions of employment. It has no expertise because there is no uniform regulatory scheme governing such terms and conditions of employment. There is simply no need for MERC in the arbitration or enforcement process and its role should be limited to the administrative and record keeping tasks assigned to it by the Legislature.

7. Section 14 Of Act 312 And Section 16 Of PERA⁸ Do Not Require Primary Jurisdiction To Vest In The MERC.

Once again, the League imputes a narrow interpretation to a broad statement by the Legislature (despite the Legislature's admonition that the provisions of Act 312 "be liberally construed"). League's Brief at 19-21. Specifically, in section 14 of Act 312, the Legislature provides that **any provision of PERA that requires fact finding**

⁸ The League's Brief initially references "sections 14 and 16 of Act 312." Because section 16 of Act 312 merely prohibits imprisonment for a violation of Act 312, the DFFA presumes that the League meant to reference section 16 of PERA and will respond as such.

procedures is “inapplicable to disputes subject to arbitration” under Act 312. M.C.L. 423.244 (emphasis added). The League has simply determined, on its own authority, that the fact finding procedures outlined in section 16 of PERA are not the fact finding procedures that the Legislature had in mind. Rather, the League has determined on its own accord that the only relevant “fact finding” provision is in the LMA and made applicable to PERA by its terms. League’s Brief at 20-21 quoting M.C.L. 423.25. The League is wrong – the Legislature specifically included “any provision of PERA that requires fact finding procedures” in the exception. Therefore, the fact finding provision identified by the League **and** section 16 of PERA are “inapplicable to disputes subject to arbitration” because:

- Section 16 provides the guidelines for a complaint and answer – both fact finding procedures. M.C.L. 423.216(a).
- Section 16 permits a person to appear in person and give testimony – a fact finding procedure. M.C.L. 423.216(a).
- Section 16 requires that testimony be reduced to writing and filed with the commissioner – a fact finding procedure. M.C.L. 423.216(b).

Without a doubt, all of section 16 of PERA is a “fact finding” provision. Without a doubt section 16 is **“inapplicable to disputes subject to arbitration” under Act 312.** M.C.L. 423.244. No other section of PERA (or the LMA, which is wholly inapplicable to the instant case) can change the plain language of section 14. Section 14 of Act 312 simply does not confer jurisdiction to enforce Act 312 on MERC.

8. **The League's Primary Jurisdiction Argument Is Riddled With Legal and Factual Misrepresentations and Conclusions.**

- “Deferring to MERC would promote uniformity and consistency.” League’s Brief at 18.

No. Notably, the League was forced to rely on cases that **did not** involve fire fighters or police to support this point. See *White Lake Improvement Ass’n. v. City of White Lake*, 22 Mich. App. 262, 282; 177 N.W.2d 473 (1970); *Cherry Growers, Inc. v. Michigan Processing Apple Growers, Inc.*, 240 Mich. App. 153; 610 N.W.2d 613.⁹ These cases simply do not implicate Act 312 whatsoever or enlighten this Court with regards to MERC’s jurisdiction to enforce Act 312. In fact, there is no uniformity or consistency – nor any uniformity or consistency requirement – in terms and conditions of employment for the various fire fighters and police officers throughout the state. Rather, the bargaining process anticipates a vast array of results.

- While the violations arise out of different contexts, they govern precisely the same behavior. League’s Brief at 18.

No. The violations do arise out of different contexts. However, to simply call each behavior “an unfair labor practice” is to grossly understate the reality. Section 13 violations involve a myriad of different behaviors – requiring knowledge of the terms and conditions governing the specific

⁹ These cases demonstrate only that MERC has jurisdiction to enforce PERA – an issue not questioned in the instant case.

employment relationship (such knowledge being outside of the MERC's expertise) – not of some regulatory scheme.

- The lack of primary jurisdiction endangers the purpose of PERA/Act 312. League's Brief at 19.

No. As an initial matter, and as previously explained, PERA and Act 312 have different purposes as determined and articulated by the Legislature. Moreover, the City has the power to control the length of the Act 312 arbitration process and the length of time an injunction remains effective. To *wit*, Act 312 prescribes time limits for each step in the process. Those limits may not be extended without the City's agreement. Act 312 arbitration proceedings are generally completed in a matter of weeks. An injunction cannot remain in effect after issuance of an award.¹⁰ Moreover, as the trial court in the instant case recognized, the disputed issue (that is the focus of the injunction) may be addressed immediately and independently of other arbitration issues. In the instant case, it is the City – not the DFFA – that has refused to permit the arbitration process to work. The City (or its *amici*) may not now (disingenuously) claim that the

¹⁰ The Injunction in the instant case incorporates such a requirement, stating:

IT IS FURTHER ORDERED that this Order shall expire upon the issuance of a final and binding Act 312 award relating to the proposed restructuring and layoff provisions of the City of Detroit's plan relative to the wages, hours and conditions of employment (including safety) of the members of the [DFFA].

Appellant's Appendix at 520a.

process “may result in a staggeringly long and inequitable delay...”¹¹

League’s Brief at 19.

For each of the above reasons, the League’s argument is unavailing. The circuit courts properly have jurisdiction to enforce section 13 of Act 312.

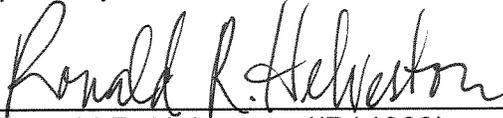
IV. CONCLUSION

As explained throughout this brief and the DFFA’s previous supplemental brief addressing primary jurisdiction, the MERC simply does not have primary jurisdiction to enforce section 13 of Act 312. It is the conclusion required by the plain language of both PERA and Act 312. It is the conclusion required by the clear legislatively-defined purpose of Act 312. It is the conclusion required by the Legislature’s knowledge of thirty years of jurisprudence recognizing the circuit courts’ jurisdiction to enforce Act 312. It should be the conclusion of this Court in the instant case.

¹¹ It bears repeating that the law cannot be interpreted merely for the convenience or benefit of the City of Detroit.

WHEREFORE, for the reasons stated herein and in each preceding brief Appellee Detroit Fire Fighters Association respectfully requests that this Honorable Court affirm the Court of Appeals decision and find that the trial court had the jurisdiction to hear the instant case and properly issued an injunction to remedy the City's flagrant violation section 13 of Act 312.

Respectfully submitted,

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