STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES, a Michigan nonprofit membership corporation,

Plaintiff-Appellee,

v

STATE OF MICHIGAN AND OFFICE OF THE STATE EMPLOYER,

Defendants-Appellants.

Supreme Court No. **147511**

Court of Appeals No. **304920**

Court of Claims Case No.: **10-37-MK**

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PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

I. DOES THE COURT OF CLAIMS HAVE JURISDICTION OVER APPELLEE'S BREACH OF CONTRACT CLAIM, CONCURRENT WITH THE CIVIL SERVICE COMMISSION'S JURISDICTION OVER UNFAIR LABOR PRACTICE CLAIMS ARISING FROM THE SAME FACTS?

The Court of Claims has answered this question "YES."

The Court of Appeals has answered this question "YES."

The Defendants-Appellants answer "NO."

The Plaintiff-Appellee answers "YES."

II. IS THE CONSENSUS AGREEMENT BETWEEN THE PARTIES ENFORCEABLE AND DID APPELLANT BREACH IT?

The Court of Claims has answered this question "YES."

The Court of Appeals has answered this question "YES."

The Defendants-Appellants answer "NO."

The Plaintiff-Appellee answers "YES."

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STATE PERSONNEL DIRECTOR REGULATION INVOLVED

Appellants set forth the constitutional provisions and Civil Service Rules they believe are involved. Appellants did not set forth the following regulation, which expressly recognizes that the meet-and-confer process between the Office of the State Employer and MAGE may result in Consensus Agreements:

> "2. **Consensus Agreements.** The [Coordinated Compensation] Panel shall also consider any recommendations that **represent an agreement** or consensus between the OSE and limited recognition organizations or between the OSE and other participants in the coordinated compensation process." (Emphasis Added). Regulation 6.06, Standard 4D2.

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COUNTERSTATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Plaintiff-Appellee Michigan Association of Governmental Employees (hereinafter "MAGE") represents classified Civil Service employees of the State of Michigan, who are not eligible for full collective bargaining. MAGE's members are known in the Civil Service system as "nonexclusively represented employees" (hereinafter "NEREs"); *i.e.*, managers, supervisors, and confidential employees who are excluded from collective bargaining.

Nonetheless, pursuant to Civil Service Commission Rules, NEREs are allowed to join what are known as "limited-recognition organizations" (hereinafter "LROs"), such as MAGE, for purposes of representation in the compensation-setting process, disciplinary grievances, and other matters. The Office of the State Employer (hereinafter "OSE") represents the State of Michigan in its dealings with employee organizations. Civil Service Rules specifically impose on OSE the obligation to meet with limited-recognition organizations such as MAGE, and specifically impose an obligation to meet and confer with regard to compensation of MAGE's members. Even though Civil Service Rules impose no obligation on these parties to enter into an agreement (because there is no collective bargaining), the rules specifically recognize that the parties may enter into a consensus agreement by which they agree to jointly recommend to the Civil Service Commission the compensation that NEREs are to receive. Regulation 6.06, Standard 4D2. It is OSE's breach of such a consensus agreement, which called for a 3 percent general wage increase in FY 2010-2011, that gives rise to this lawsuit.

In the Consensus Agreement (**APP EX 1**) between MAGE and other LROs representing NEREs and OSE, the parties agreed that they would recommend to the Coordinated Compensation Panel (appointed by the Civil Service Commission to consider and recommend to the Commission compensation for NEREs) a 0 percent general wage

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increase, a 1 percent general wage increase, and a 3 percent general wage increase for fiscal years 2009, 2010, and 2011, respectively. MAGE President Dale Threehouse and the only OSE representative willing to testify,[1] OSE Deputy Director Tom Hall, testified that they considered their organizations bound by the instant Consensus Agreement and past Consensus Agreements. HERM 2010-059.[2] Hall did attempt to fudge his testimony by stating that such agreements are based upon circumstances in existence at the time the agreements are reached. *Id., p. 8.*

All parties abided by the terms of the Consensus Agreement for fiscal years 2009 and 2010; *i.e.*, all parties recommended to the Civil Service Commission the agreed-upon 0 percent and 1 percent general wage increases. The Commission adopted those recommendations. Nonetheless, after it had enjoyed the fruits of the LROs' agreement to recommend only 0 percent and 1 percent and the LROs' acceptance of health insurance concessions, in December 2009 OSE reneged on the part of the agreement calling for a 3 percent general wage increase in fiscal year 2011. OSE did not assert at the time that compliance was impossible. Hall denied that OSE was motivated by an inability to pay (HERM 2010-059, **APP EX. 9**, at p. 9), but testified that OSE's action was due to the projected $1.5 to $1.7 billion budget deficit. *Id.* At the same time OSE reneged on its agreement to recommend a 3 percent increase for NEREs, it affirmed its obligation to pay 3 percent increases to the greater number of employees covered by collective bargaining agreements. It even extended those contracts for another year at the higher rates. *Id., p. 6.*

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[1] The then Director of OSE refused to appear at the unfair labor practice hearing, in defiance of the Hearing Officer's Order. **APP EX. 9**, pp. 9-10).

[2] HERM 2010-059 is the Civil Service Hearing Officer's Decision in the unfair labor practice case, arising from the same facts, pursued by MAGE and other LROs against OSE. **APP EX. 9**. Testimony from the unfair labor practice hearing was entered in the Court of Claims Record in support of the parties' respective Motions for Summary Disposition.

OSE has never asserted that the Consensus Agreement means anything other than what it says in plain English, that the parties would jointly recommend a 3 percent general wage increase for fiscal year 2011. Hall admitted that during a December 7, 2009, meeting between OSE and the Executive Office, the possibility of OSE reneging on its commitment to recommend a 3 percent general wage increase was discussed. *Id., p. 9.* He testified that he did not know who made the decision to renege on the agreement, and testified that it was not made until the afternoon of December 21, 2009, after a meeting with the LROs that morning. *Id.* Nonetheless, he also admitted that he drafted the December 21, 2009, letter announcing that OSE was reneging on the Consensus Agreement, on December 10, 2009. *Id, pp. 8-9.* He testified he did not remember who told him to draft it, but that he would not have drafted it of his own volition. He testified that he took his direction from [former] OSE Director Sharon Bommarito. HERM 2010-059, **APP EX. 9,** p. 8.

At the December 21, 2009, meeting between OSE and the LROs, OSE asked the LROs what they would think if OSE failed to recommend the scheduled 3 percent general wage increase. *Id, p. 4.* After they reacted unfavorably, the meeting ended, and OSE unilaterally sent the letter recommending no pay increase, to the Coordinated Compensation Panel later the same day. *Id., p. 4.*

The Coordinated Compensation Panel rejected OSE's recommendation, and recommended that the Civil Service Commission grant a 3 percent general wage increase. At the subsequent Civil Service Commission meeting, OSE undermined the Coordinated Compensation Panel's recommendation by again recommending that there be no general wage increase. The Commission rejected the Coordinated Compensation Panel's recommendation

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(on a 2-to-2 vote), as well as those of the LROs in conformance with the Consensus Agreement, and adopted OSE's recommendation of no wage increase.

MAGE and other limited-recognition organizations pursued unfair labor practice charges against OSE, pursuant to the Civil Service Commission's administrative procedures. The charges alleged OSE violated Civil Service Rule 6-11.1 ("Coercion"), Civil Service Rule 6-11.2 ("Interference"), Civil Service Rule 6-11.3 "Discrimination"), and Civil Service Rule 6-11.4 ("Refusal to Bargain"). See HERM 2010-059, **App Ex. 9**, p. 1). The charges did not include "breach of contract" because there is no Civil Service Rule proscribing breach of contract.

As noted above, the Civil Service Hearing Officer found on October 5, 2010, that the Consensus Agreement was binding on the parties, and that OSE repudiated it by refusing to support a 3 percent wage increase for FY 2010-11 for NEREs, including MAGE's members. *Id, pp. 2, 8-9.* The Hearing Officer concluded that OSE violated Civil Service Rules prohibiting coercion, interference with employee rights, and discrimination, *Id., pp. 1, 34-36,* and imposed unfair labor practice remedies such as a cease and desist order, an order that OSE post notices of his findings and conclusions, and an award of attorney fees. The Hearing Officer did not purport to impose a remedy for a breach of contract because he recognized that while the Consensus Agreement is a contract, Civil Service Rules do not proscribe breach of contract:

> "Since the parties have a contract, but do not have a remedy in this forum, unless the Civil Service Commission decides that they do have a remedy in this forum on appeal, they may have an action for damages on a breach of contract theory in a court of competent jurisdiction since they appear to have no administrative remedy for the harm done them." *Id., p. 33*

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He also found that he lacks the power, in the unfair labor practice process, to impose the pay increase:

> "The hearing officer believes that to be beyond the scope of his authority, since such damages would be awarded for breach of contract. The hearing officer has no authority to adjudicate breach of contract disputes of the nature presented in this hearing." *Id., p. 38.*

OSE appealed the Hearing Officer's decision, but later withdrew its appeal as to all issues except the award of attorney fees. Hence, the Hearing Officer's decision is the final Civil Service Commission decision on the unfair labor practice issue.[3]

Separately, MAGE filed suit in the Court of Claims. The suit contained three counts, for breach of contract, unjust enrichment, and violation of MAGE members' constitutional equal protection rights, because Appellee refused to abide by the Consensus Agreement while simultaneously abiding by collective bargaining agreements covering rank-and-file employees, which granted 3 percent pay raises to those employees.

After hearing cross-motions for summary disposition, the Court of Claims on June 15, 2011, granted summary disposition in favor of MAGE with regard to the breach of contract claim, while granting Appellant's Motion for Summary Disposition with regard to the unjust enrichment and equal protection claims. Consistent with MCR 2.116(C)(10), the Court of Claims has reserved for trial the question of damages for the one count it sustained, the breach of contract.

Appellants then filed an interlocutory Application for Leave to Appeal with the Court of Appeals. After the Court of Appeals rejected the interlocutory leave application,

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[3] The Civil Service Commission ultimately reversed the Hearing Officer's award of attorney fees. CSC 2011-055 (December 29, 2011). The reversal was limited to the award of attorney fees; all other aspects of the Hearing Officer's Decision remain in effect.

Appellants sought review by the Supreme Court. The Supreme Court remanded to the Court of Appeals for consideration as on leave granted.

On June 20, 2013, the Court of Appeals affirmed the Court of Claims order granting MAGE summary disposition on the breach of contract claim. The instant Application for Leave to Appeal followed. Because the appeal is interlocutory, the damages phase of the case still is yet to be tried in the Court of Claims.

ARGUMENT

I. THE COURT OF CLAIMS HAS JURISDICTION OVER MAGE'S BREACH OF CONTRACT CLAIM.

A. COUNTERSTATEMENT OF THE STANDARD OF REVIEW.

The Standard of Review set forth in the Appellant's brief is correct, and complete.

B. THE COURT OF CLAIMS AND CIVIL SERVICE COMMISSION HAVE CONCURRENT JURISDICTION OVER BREACH OF CONTRACT CLAIMS AND UNFAIR LABOR PRACTICE CLAIMS, RESPECTIVELY, ARISING FROM THE SAME CIRCUMSTANCES.

Although the breach of contract claim and the unfair labor practice claims arise from the same set of facts, the claims present separate legal issues appropriate for resolution in separate forums with concurrent jurisdiction.

A breach of contract claim is subject to the Court of Claims' exclusive jurisdiction:

> "Except as provided in Section 6419a and 6440, the jurisdiction of the Court of Claims, as conferred upon it by this chapter, shall be exclusive.... The Court has power and jurisdiction:
>
> > "(a) To hear and determine all claims and demands, liquidated and unliquidated, *ex contractu ex delicto* against the State and any of its departments, commissions, boards, institutions, arms, or agencies...." MCL 6419(1).

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The noted exceptions are inapplicable. Breach of contract being "*ex contractu,*" the Court of Claims has exclusive jurisdiction over this breach of contract claim.

Nothing in the Civil Service provision of Const 1963, art 11, §5, nor in Civil Service Commission Rules and Regulations, is to the contrary. No such provision even purports to confer on the Commission exclusive authority to remedy breaches of contract. Civil Service Rules define unfair labor practices, but do not include "breach of contract" among proscribed unfair labor practices. Neither MAGE nor the other Charging Parties in the unfair labor practice proceeding charged or sought a remedy for "breach of contract"; and as noted above, the Hearing Officer specifically noted that they may have an action for a breach of contract in a court of competent jurisdiction, rather than before the Civil Service Commission. **APP EX. 9,** p. 25.

Appellants argue that because the Civil Service Commission had jurisdiction over the unfair labor practice charges arising from Appellants OSE's repudiation of the Consensus Agreement, the Doctrine of Primary Jurisdiction deprives the Circuit Court of jurisdiction over the breach of contract claim. Appellants' reliance on cases discussing the Doctrine of Primary Jurisdiction is misplaced; the case law makes clear that the courts have concurrent jurisdiction over breach of contract claims, arising from conduct which also creates unfair labor practice claims subject to administrative agency jurisdiction.

As held in *Traveler's Insurance Company v. Detroit Edison Company*, 465 Mich 185; 631 NW2d 733 (2001), Michigan recognizes "application of the primary jurisdiction doctrine to all cases in which it was deemed that an administrative agency possessed superior knowledge and expertise in addressing recurring issues within the scope of their authority." 465 Mich at 200.

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In applying the Doctrine of Primary Jurisdiction, courts have evaluated the nature of the claim in light of the three purposes underlying the doctrine. *Michigan Basic Property Ins Assn v. Detroit Edison Co*, 240 Mich App 524, 534; 618 NW2d 32 (2000). The Michigan Supreme Court has determined that these purposes are: (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities. *Rinaldo's Construction Corp v. Michigan Bell Telephone Co*, 454 Mich 65, 71; 559 NW2d 647 (1997), *citing Davis & Pierce*, 2 Administrative Law (3d Ed), § 14.1, p. 272.

Although the Civil Service Commission has plenary authority "in its field," (*Viculin v. Department of Civil Service*, 386 Mich 375, 398; 192 NW2d 449 (1971)), claims for breaches of contract are not within its special expertise and plenary authority; claims of a breach of contract are for the courts to address.

Traveler's is instructive in this regard. *Traveler's* noted that claims for breach of contracts to provide utility services are within the primary jurisdiction of the Michigan Public Service Commission, 465 Mich at 202, *citing Valentine v. Michigan Bell Telephone Company*, 388 Mich 19; 199 NW2d 182 (1972), and *Thomas v. General Telephone Directory Company*, 127 Mich App 788; 339 NW2d 257 (1983). That rule, however, applies to the Public Service Commission, because:

> "[T]he code or tariff [promulgated by the Public Service Commission] *is part of the contract between the parties* and limits of liability therein contained are presumptively valid. *Any claim based upon the contractual obligation of the parties is limited to validly promulgated provisions of the tariff or code within the authority of the Public Service Commission.* Ordinarily, a party aggrieved by the provisions of a tariff or code should seek relief by an attack upon those provisions before the Public Service Commission and from it to the Ingham

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County Circuit Court." *Thomas*, 127 Mich App at 791, *quoting Valentine*, 388 Mich at 26. (Emphasis added).

By contrast, none of the language at issue in the instant Consensus Agreement was mandated by, or adopted from, any rule or regulation of the Civil Service Commission. There is no Civil Service Commission equivalent of the Public Service Commission "tariff" that has been incorporated into the Consensus Agreement. Hence, determining its terms does not require interpreting Civil Service Commission rules or regulations. The Consensus Agreement is simply a straightforward contract in which the parties mutually agreed to make certain recommendations, and forego requesting anything at odds with those recommendations. That sharply contrasts with the basis in *Traveler's* for finding primary jurisdiction on the part of the MPSC ("[T]he MPSC clearly possessed the authority and expertise to consider *Traveler's* breach of contract claims under General Rule No. 4 of MPSC Tariff No. 4"; *Traveler's*, 465 Mich at 203.).

For similar reasons, Appellants' reliance on *Rinaldo's Construction Corp v. Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997), is misplaced. There, primary jurisdiction applied to a tort claim "because it arises solely out of the contractual relationship between the telephone company and the plaintiff, its customer, *and is limited by Tariff 7*." *Id. at 67.* (Emphasis added). Just as in *Travelers*, resolution of the dispute required application of a Public Services Commission tariff, something within its expertise and, therefore, its primary jurisdiction. By contrast, determining the meaning of the instant contract and its breach requires no agency expertise; breach is practically conceded by Appellants.

Appellants distant the nature of the dispute in an attempt to shoehorn it into the doctrine of primary jurisdiction. For example, they write that "the Commission provides a specific, exclusive remedy for the employer's alleged unfair labor practice—the presentation

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of an alternate pay position without the 'meet and confer' required by the Consensus Agreement." Application for Leave to Appeal, p. 11. In fact, the Consensus Agreement required the parties to recommend the pay increase, not engage in more "meet and confer." Appellants state, "only the Commission may fashion a remedy for alleged breach of an agreement authorized by its Rules." *Id.* Yet, the Hearing Officer held he lacks the authority to address breach of contract under Commission Rules. Similarly, Appellants characterize a breach of contract as an unfair labor practice (*Id.*) while the unfair labor practice rules do not include breach of contract, and the Hearing Officer so found.

Appellants incorrectly cite *Abel v. Behrendt*, 320 Mich 616; 32 NW2d 4 (1948), for the proposition that the doctrine of primary jurisdiction has been specifically applied to the Civil Service Commission. *Abel* involved the Wayne County Civil Service Commission, not the Michigan Civil Service Commission, in a suit asking the court to determine the Civil Service status of employees of the County Sheriff. That question, unlike a breach of contract claim, was clearly within the authority of the Wayne County Civil Service Commission. 320 Mich at 622.

In *Bay City Schools v. Education Association*, 425 Mich 429; 390 NW2d 159 (1986), the court noted that the Michigan Employment Relations Commission has exclusive jurisdiction over unfair labor practice charges arising under the Public Employment Relations Act (MCL 423.201, *et seq.*), just as the Civil Service Commission has exclusive jurisdiction over unfair labor practice claims by State classified Civil Service employees. See also, *Rockwell v. Crestwood Board of Education*, 393 Mich 616; 227 NW2d 736 (1975), *appeal dismissed* 427 US 901; 96 S Ct 3184; 49 L Ed 2d 1195. Nonetheless, *Bay City Schools* held that where statutory unfair labor practice claims submitted to the Michigan Employment

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Relations Commission and contractual claims submitted to arbitration arise out of the same controversy, the Michigan Employment Relations Commission and the contractual arbitrator have concurrent jurisdiction. 425 Mich at 429-30. The Supreme Court explained:

> "Contractual and statutory claims, whether or not based on the same controversy, generally involve different legal and factual issues that are to be decided in different fora. A collective bargaining agreement may provide benefits to a union or its members not provided in the PERA [Public Employment Relations Act] without conflicting with the PERA. The PERA is not implicated unless the decisions of the MERC and an arbitrator conflict. We conclude that the rights arising under the contract may be enforced unless the contract protects what the PERA prohibits or the arbitrator's decision conflicts with a prior MERC decision." 425 Mich at 430.

Appellants point out that *Bay City Schools* addressed the interplay of contractual claims and statutory claims under the Public Employment Relations Act, while the related administrative claim in the instant case arises not under PERA, but under the Rules of the Michigan Civil Service Commission. Nonetheless, nothing in *Bay City Schools* or Civil Service Rules suggests that is a distinction that makes a difference. The Civil Service Commission expressly recognizes that the pay-setting process can result in consensus agreements[4]; nothing suggests those agreements are not enforceable as contracts, or that the Commission has established an exclusive administrative enforcement mechanism for breach of those contracts.

The contract at issue, the Consensus Agreement, does not contain an arbitration clause. Hence, the proper forum for resolving the breach of contract claim is in the Court of Claims. See *UAW Local 495 v. Diecast Corporation*, 52 Mich App 372; 217 NW2d 424

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[4]See p. 16, *infra*.

(1974). (The courts and the National Labor Relations Board have concurrent jurisdiction over breach of contract claims and unfair labor practice charges, respectively, in the private sector); *Mt. Clemens Firefighters Union v. City of Mt. Clemens*, 58 Mich App 635; 228 NW2d 500 (1971). (The courts and either the National Labor Relations Board or the Michigan Employment Relations Commission have concurrent jurisdiction over breach of contract claims and unfair labor practice charges, respectively).

Appellants cite *Bonneville v. Michigan Corrections Organization*, 190 Mich App 473, 477; 476 NW2d 411 (1991), as rejecting the application of concurrent jurisdiction to claims brought by Civil Service employees. *Bonneville* did not present a breach of contract claim. Instead, *Bonneville* presented an attempt by exclusively represented Civil Service employees to sue their union for breach of the duty of fair representation. 190 Mich App at 475. A breach of the duty of fair representation is considered to be an unfair labor practice, which unlike claims of breach of contract, are specifically proscribed by Civil Service Commission Rules and within the Civil Service Commission's administrative procedures for processing unfair labor practice charges. *Id., pp. 475-76.*

Appellants also assert that MAGE's breach of contract claim is barred on the ground that it failed to exhaust administrative remedies. " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency ***alone....***" *Traveler's*, 465 Mich at 197, *quoting United States v. Western PR Company*, 352 US 59, 63-64; 77 S Ct 161; 1 L Ed 2d 126 (1956) (Emphasis added). The word "alone" means that exhaustion is not required where there is no primary jurisdiction on the agency's part. Indeed, the two doctrines are closely related. *Traveler's*, pp. 196-198.

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The cases cited by Appellants do not apply the exhaustion doctrine to a breach of contract claim; doing so would be at odds with the concurrent jurisdiction recognized in *Bay City Schools* and in *Rockwell*. *Mollett v. Taylor, 197 Mich App 328; 494 NW2d 832 (1992),* involved a municipal Civil Service Commission, not the Michigan Civil Service Commission (197 Mich App at 331), and barred a claim because of the Plaintiff's failure to exhaust a contractual grievance and arbitration remedy (a remedy not contained in the instant Consensus Agreement). 197 Mich App at 334-35. As noted above, *Bonneville,* rejected an attempt to sue in court over an alleged breach of the duty of fair representation by a union, a claim clearly within the scope of Civil Service Rules. 190 Mich App at 474-75. Similarly, *O'Keefe v. Department of Social Services*, 162 Mich App 498; 127 NW2d 793 (1987), involved an attempted by union members to sue for breach of a letter of understanding between their union and their employer; because the union had determined not to invoke the contractual arbitration process, and because plaintiffs' contract breach claim depended upon their duty of fair representation claim, which is within the Commission's exclusive jurisdiction, exhaustion was required. 162 Mich App at 505-09. *Bayes v. Department of State Police*, 89 Mich App 356; 280 NW2d 526 (1979), rejected a suit claiming that standby time is tantamount to work time within the meaning of Civil Service Rules; because the suit alleged a violation of Civil Service Rules, the claim was within the Civil Service Commission's exclusive jurisdiction and Civil Service procedures for addressing alleged rules violations were required to be exhausted. 89 Mich App at 358.

Moreover, requiring exhaustion would be futile where, as here, the Civil Service Commission provides no procedure for addressing, nor a remedy for, a breach of contract.

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The Hearing Officer recognized such in his decision, eight months before the Court of Claims grant of partial summary disposition on the breach of contract claim.

Appellants assert that MAGE has not alleged the Civil Service process resulted in an inadequate remedy, or identified any available remedies other than those obtained in the Commission's process. As a practical matter, MAGE has received virtually no remedy in the Civil Service process: An order that OSE cease and desist from failing to abide by the terms of the Consensus Agreement (which closed the barn door after the horses had run out, because the pay-setting process was already complete by then); the posting of notices of his finding of unfair labor practices, and an award of attorney fees (which award the Commission reversed on appeal).

Keeping in mind that the hearing officer expressly found he lacks the power to address a breach of contract, and that the damages issue has not yet been tried in the Court of Claims, MAGE should be permitted to go to trial and make a record with regard to damages. As the Court of Appeals noted, "While Defendants argue on appeal that the Court of Claims lacks the power to award compensation increases to State employees, the Court of Claims does not lack the authority to award damages for breach of contract." Slip Op, p. 4. Whether the measure of those damages is the lost compensation, the value of the consideration MAGE members gave up in the earlier years of the Consensus Agreement, membership losses because the credibility of the compensation process was destroyed when OSE reneged on the Consensus Agreement, or something else, should be remanded to the Court of Claims for trial, not decided in an interlocutory appeal after partial summary disposition.

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II. APPELLANTS BREACHED AN ENFORCEABLE CONTRACT.

A. COUNTERSTATEMENT OF THE STANDARD OF REVIEW.

The Appellants Statement of the Standard of Review is correct, and incomplete.

B. ARGUMENT

(1) MAGE is Competent to Enter Into a Contract Such as the Consensus Agreement.

Appellants inaccurately state that a limited-recognition organization such as MAGE does not have the right to enter into contracts under Civil Service Rules and Regulations. Although MAGE does not have the right to engage in collective bargaining, the Rules and Regulations do expressly recognize MAGE's right to engage Defendants in the pay-setting process, and to enter into Consensus Agreements such as the one that constitutes the contract in the instant case.

Rule 6-5.1 provides, in relevant part, that, "employees may organize, form, assist, join, or refrain from joining labor organizations." That these rights are not limited to employees eligible for exclusive representation is made clear from the very next sentence, which expressly distinguishes "eligible" employees as those who may engage in concerted activities for collective bargaining.

Rule 6-8.3 provides in relevant part:

> "Employees in excluded positions are not eligible for exclusive recognition but may join **and be represented by** limited-recognition organizations unless otherwise prohibited by this Rule." (Emphasis added).

The phrase "be represented by" is significant; as discussed below, the State Personnel Director expressly recognizes that limited recognition organizations may represent their

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members in the coordinated compensation process. That is implicit in Rule 6-2.2, which states:

> "The Civil Service Commission authorizes classified employees in nonexclusively represented positions to designate limited recognition organizations **to meet and confer with the employer over rates of compensation and other conditions of employment** and to represent members in civil service grievance proceedings. **The employer, employees, and the limited recognition organizations shall have the rights and obligations provided in the Civil Service Rules and Regulations.**" (Emphasis added.)

"Meet and confer" is defined as:

> "The mutual obligation of employees or their representatives and the employer to meet at reasonable times and confer in good faith regarding rates of compensation and other terms and conditions of employment." Civil Service Rule 9-1.

Crucially, Regulation 6.06, Standard 4D2 *expressly recognizes that the meet and confer process may result in consensus agreements*:

> "2. **Consensus Agreements**. The [Coordinated Compensation] Panel shall also consider any recommendations that **represent an agreement** or consensus between the OSE and limited-recognition organizations or between the OSE and other participants in the coordinated compensation process." (Emphasis added).

Hence, Appellants' argument that MAGE is not competent to contract because it has no right to enter into a contract simply is false. It does not have a right to engage in collective bargaining, but its ability to enter into agreements such as the Consensus Agreement at issue is expressly recognized in the applicable Rules and Regulations.

Appellants have simply ignored Regulation 6.06, Standard 4D2 throughout these proceedings. At pages 16 and 17 of their Application for Leave to Appeal, Appellants argue that LROs such as MAGE have no right to enter into contracts with the employer under Civil Service Rules, and that the trial court and the Court of Appeals concluded that Consensus

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Agreements are authorized simply because of past practice. That argument ignores Regulation 6.06, Standard 4D2, which expressly recognizes that LROs such as MAGE may enter into Consensus Agreements in the coordinated compensation process. The Court of Appeals relied not on some past practice, but noted that, "Indeed the Regulations allowed LROs to enter into Consensus Agreements such as the one at issue in this case." Court of Appeals Slip Opinion, p. 3. The facts that MAGE is not allowed to engage in collective bargaining or enter a collective bargaining agreement are inapposite. MAGE is expressly allowed to enter a Consensus Agreement such as the one at issue.

Moreover, nothing in the rules, regulations, or commission practice states or implies that Consensus Agreements are something less than enforceable agreements. The parties, including OSE's witness, Tom Hall, testified that they have always considered themselves bound by them once entered. HERM 2010-059 (App. Ex. 9, p. 8).

After noting, correctly but inappositely, that MAGE is not permitted to enter into collective bargaining agreements, Appellants argue that because collective bargaining agreements require Commission ratification before they are effective, ratification must also be required of Consensus Agreements. No such requirement applies to Consensus Agreements; the above-quoted Regulation 6.06 is the sole reference to Consensus Agreements in the Regulation, and appears in a different place than the rules governing collective bargaining.

(2) MAGE and its Members Gave Real Consideration Supporting the Consensus Agreement.

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One need only examine the pay increases (or lack thereof) in the prior years of the Consensus Agreement, as well as the fringe benefit concessions in the Consensus Agreement, to understand that MAGE and its members gave real consideration for Defendants' promise to recommend a 3 percent pay raise in the last year of the Consensus Agreement. MAGE and its

members gave up their right to advocate in favor of a larger pay raise in the earlier years of the Consensus Agreement, in return for Defendants' promise to call for a 3 percent pay raise in the final year of the Consensus Agreement. The later was a direct *quid for the quo* for the former. Appellants enjoyed a real benefit from the consideration given by MAGE and its members; *i.e.*, they did not face the risk of MAGE advocating in favor of and winning, pay raises in the earlier years of the Consensus Agreements, or fewer fringe benefits concessions. Appellants' argument that the consideration given by MAGE was unenforceable and illusory, is of a piece with their mindset with regard to their own obligation under the Consensus Agreement. Appellants treated the Consensus Agreement as binding and enforceable until they decided it was inconvenient; only after they enjoyed the earlier years' benefits of the Consensus Agreement, when the time came for them to give the *quid pro quo*, did they decide to disregard it.

As the Court of Appeals stated:

> "An enforceable contract requires legal consideration be given by each party.... Here, Plaintiff promised to recommend the indicated compensation increases to the coordinated compensation panel for fiscal years 2009, 2010, and 2011. By agreeing to recommend those amounts, Plaintiff surrendered the opportunity to lobby for larger compensation increases for its members. Furthermore, Defendants do not dispute Plaintiff's assertion that it agreed to fringe benefit concessions. This constitutes valuable consideration. While Defendants argue on appeal that promises to recommend certain amounts to the coordinated compensation panel are 'illusory,' Defendant OSE's own conduct belies this assertion, as it found breaching the Consensus Agreement and recommending a 0 percent compensation increase for fiscal year 2011 to be a valuable course of action." Court of Appeals Slip Opinion, p. 4.

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(3) Performance of the Contract is not Objectively Impossible.

Similarly, Appellants' argument that the contract is objectively impossible to perform, must be rejected. Its argument amounts to no more than an argument that performance will be expensive. Expensive does not equate to impossible. Appellants implicitly admitted as much,

CONCLUSION AND RELIEF REQUESTED

Hence, MAGE respectfully requests that Appellants' appeal be denied, and the case remanded to the Court of Claims for consideration of the appropriate remedy.

Respectfully submitted,

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Dated: August 26, 2013

PROOF OF SERVICE

Patricia L. Nash states that on August 26, 2013, she served copies of ***Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal*** upon the following attorney of record:

Ms. Margaret A. Nelson
Assistant Attorney General
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by placing the same in an envelope addressed to said individual at the aforesaid business address and depositing same in the U.S. mail.

_____
Patricia L. Nash