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. _____ 6-2073

Court of Appeals No. 304920

Court of Claims No. 10-000037-MK

J. Drayanchuk

STATE OF MICHIGAN AND OFFICE OF THE STATE EMPLOYER'S APPLICATION FOR LEAVE TO APPEAL

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APPL

8/27

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STATEMENT OF QUESTIONS PRESENTED

I. Do Michigan trial courts have jurisdiction over a breach-of-contract claim against the State Employer where the contractual relationship is governed by the Civil Service Commission's rules and regulations and the dispute is being actively litigated in administrative proceedings?

Trial Court's answer: Yes.

Appellants' answer: No.

Appellee's answer: Yes.

Court of Appeals' answer: Yes

II. Did the trial court err in concluding that a contract enforceable at law existed between the parties and that the State Employer's "breach" of that contract is not excused as a matter of law?

Trial Court's answer: No.

Appellants' answer: Yes.

Appellee's answer: No.

Court of Appeals' answer: No.

CONSTITUTIONAL PROVISIONS AND CIVIL SERVICE RULES INVOLVED

This appeal primarily involves the interpretation and application of one constitutional provision.

Article 11, § 5 of the 1936 Constitution provides, in relevant part:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.
>
> * * *
>
> The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.
>
> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, *make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.*
>
> * * *
>
> Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority

vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

* * *

. . . . Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state. [Emphasis added.]

This appeal also involves interpretation and application of the following Civil Service Commission Rules.

6-2 Employee-Employer Relations Systems

6-2.1 Collective Bargaining Authorized

The civil service commission authorizes classified employees in eligible positions to organize, elect an exclusive representative, and negotiate with the employer over proper subjects of bargaining.

(a) Rights and obligations. The employer, employees, and exclusive representatives have the rights and obligations provided in the civil service rules and regulations.

(b) Subjects of bargaining. The employer and the exclusive representative are required to bargain in good faith over mandatory subjects of bargaining. The employer may, but is not required to, negotiate over permissive subjects of bargaining. A party cannot bargain over prohibited subjects of bargaining.

(c) Intent; retention of authority. The civil service commission intends to defer to and approve collective bargaining agreements negotiated in good faith between the employer and an exclusive representative when permitted by

this chapter. However, the commission is obligated to retain and exercise its constitutional authority in all matters. The commission expressly retains the authority to do all of the following:

(1) Review, modify, or reject, in whole or in part, each proposed collective bargaining agreement.

(2) Determine, during the term of a collective bargaining agreement, if a provision previously approved has been applied or interpreted to violate or otherwise rescind, limit, or modify a civil service rule or regulation governing a prohibited subject of bargaining, notwithstanding any contrary provision of the agreement.

(d) Collective bargaining agreement as substitute rules. Each collective bargaining agreement approved by the civil service commission is expressly subject to and governed by the civil service rules and regulations. The approval of a collective bargaining agreement by the commission is a quasi-legislative act. The provisions of a collective bargaining agreement, when approved by the commission, become a subset of the civil service rules governing rates of compensation and other conditions of employment for the eligible employees in the applicable unit.

(e) Collective bargaining agreement as a binding agreement. An approved collective bargaining agreement is binding only between the employer and the exclusive representative. A collective bargaining agreement is not binding on the civil service commission.

6-2.2 Limited-Recognition Organizations Authorized

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.

6-3 Commission Authority

6-3.1 Commission Relationship to Collective Bargaining

The ability of eligible employees to elect an exclusive representative and engage in collective bargaining is a privilege granted by the civil service commission under its

exclusive constitutional authority. However, the commission cannot delegate its constitutional responsibilities to the collective bargaining parties and the privilege to engage in collective bargaining remains subject to the commission's sovereign authority and the rules of the commission.

(a) Review and approval required. A collective bargaining agreement or any provision of a collective bargaining agreement cannot take effect or be enforceable between the parties unless the civil service commission has reviewed and approved the agreement or provision.

(b) Commission authority. The civil service commission retains the authority to (1) approve, modify, or reject, in whole or in part, a proposed collective bargaining agreement presented to it for review and (2) to impose on the parties and eligible employees a collective bargaining agreement as modified by the commission.

(c) Modification of agreement during term. Notwithstanding that the civil service commission previously approved the provisions of a collective bargaining agreement, the commission retains the authority, during the term of a collective bargaining agreement, to modify the agreement without the approval of the parties, as provided in rules 6-3.5 and 6-3.8(c).

(d) Effect of agreement on civil service commission. The civil service commission (including civil service staff) (1) is not a party to a collective bargaining agreement approved by the commission; (2) does not become a party to the collective bargaining agreement by virtue of the commission's review, approval, or modification; (3) is not subject to any of the provisions of a collective bargaining agreement; and (4) is not subject to the jurisdiction of an arbitrator or other fact-finder acting under authority of a collective bargaining agreement approved by the commission.

6-3.6 Application of Civil Service Rules and Regulations

(a) Nonexclusively represented employees. The rates of compensation for all classifications and other conditions of employment for nonexclusively represented employees are established in the civil service rules and regulations. An appointing authority may establish (1) individual levels of compensation within the rates fixed by the civil service commission for each classification and grade and (2) agency work rules that are not inconsistent with the constitution or applicable law, including the civil service rules and regulations.

(b) Exclusively represented employees. The rates of compensation for all existing grades within a classification of positions and other conditions of employment for exclusively represented positions may be established in a collective bargaining agreement approved by the civil service commission and in the civil service rules and regulations governing prohibited subjects of bargaining. An approved collective bargaining agreement supersedes civil service rules and regulations governing proper subjects of bargaining that would otherwise apply in the absence of the collective bargaining agreement. However, a collective bargaining agreement cannot contravene the civil service rules and regulations governing prohibited subjects of bargaining.

6-8 Recognition Rights for Labor Organizations

6-8.1 Rights of Exclusive Representatives

An exclusive representative (1) has the duty of fair representation of all employees in the unit, (2) may engage in collective bargaining with the employer, and (3), when mutual agreement is reached, may submit to the civil service commission for approval a written collective bargaining agreement regarding proper subjects of bargaining.

6-8.2 Limitation on Representation

A labor organization certified as an exclusive representative in a unit is prohibited from representing (1) any employee in an eligible position prior to being certified as the exclusive representative in the employee's unit and (2) any employee occupying an excluded position.

6-8.3 Limited-Recognition Organizations

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. Employees in eligible positions in units that have not yet elected an exclusive representative may join and be represented by limited-recognition organizations. However, a limited-recognition organization shall not represent nor seek to represent an employee in an eligible position after an exclusive representative has been certified in the employee's unit.

(a) Limited-recognition status and payroll deduction of dues. The state personnel director shall recognize as a limited-recognition organization an organization that registers with the director and provides (1) a copy of its constitution, bylaws, or other governing documents; (2) the names and addresses of its officers; (3) proof of registration as a nonprofit corporation in the state of Michigan; and (4) proof of membership of 50 or more excluded

employees. Proof of membership must be in the form of signed membership application forms. Upon submission to the office of the state employer of 50 or more appropriate dues deduction cards, such an organization has the privilege of payroll deduction of dues for members who are excluded. An employee cannot have the privilege of payroll deduction of dues to more than one organization.

(b) Limited recognition rights. An organization granted limited recognition under this rule also has the following rights:

(1) The right to express the interests of its members.

(2) The right to represent its members in civil service grievance hearings and technical appeals, when requested by the member.

(3) The right to be heard by the employer, the employment relations board, and the civil service commission.

(4) The right to union leave for union activities as may be provided in the regulations.

(c) Limitations for certain excluded employees.

(1) Limited membership permitted. The following employees may join a limited recognition organization but are prohibited from serving in any official capacity, including, but not limited to, serving as an officer, agent, or representative of the limited recognition organization:

(A) An appointing authority who is a classified employee.

(B) An excluded employee occupying a position in human resources under the direction of an appointing authority, other than the state personnel director.

(2) Membership prohibited. Notwithstanding subsection (c)(1), the following employees are prohibited from joining or being represented by a limited-recognition organization:

(A) An employee of the civil service commission.
(B) An employee of the office of the state employer.

6-10 Commission Review and Action

6-10.1 Commission Review of Agreements, Impasse Panel Recommendations, and Coordinated Compensation Recommendations

It is the policy of the civil service commission to encourage agreement between the parties. However, the commission retains the final authority to approve, modify, or reject, in whole or in part, all primary and secondary collective bargaining agreements, impasse panel recommendations, and coordinated compensation recommendations submitted to the commission. Therefore, if the parties reach a proposed collective bargaining agreement, the parties shall submit a copy of the proposed agreement to the commission for review. If the parties are at impasse, the impasse panel shall submit its recommendations for impasse resolution to the commission. The commission shall review each proposed agreement, impasse panel recommendation, and coordinated compensation recommendation. The commission shall approve, modify, or reject, in whole or in part, each agreement and recommendation.

6-11 Unfair Labor Practices for the Employer

6-11.1 Coercion

It is an unfair labor practice for the employer to interfere with, restrain, coerce, discriminate against, or retaliate against employees in the exercise of rights granted by these rules.

6-11.2 Interference

It is an unfair labor practice for the employer to dominate, interfere with, or assist in the formation, existence, or administration of a labor organization.

6-11.3 Discrimination

It is an unfair labor practice for the employer to discriminate or retaliate against an employee because that employee has (1) filed an affidavit, petition, or complaint; (2) given information or testimony; (3) formed, joined, or chosen to be represented by a labor organization; or (4) participated in a campaign or election to certify, change, or decertify an exclusive representative.

6-11.4 Refusal to Bargain in Good Faith

It is an unfair labor practice for the employer to refuse to bargain in good faith over mandatory subjects of bargaining as required by these rules.

6-13 Unfair Labor Practice Procedures

An employer, employee, or labor organization may file an unfair labor practice complaint with the state personnel director. The director has the authority to investigate, obtain facts, statements, or affidavits, make determinations of violations, and assess appropriate penalties.

STATEMENT OF JUDGMENT / ORDER APPEALED FROM AND RELIEF SOUGHT

The State of Michigan and its State Employer seek leave to appeal the Court of Appeals' opinion and order entered on June 20, 2013. The order affirmed the Court of Claims' partial grant of summary disposition to the Michigan Association of Governmental Employees (MAGE) on its breach-of-contract claim concerning state employees.

The State asks the Court to grant this application for leave to appeal, vacate the grant of partial summary disposition to MAGE on its breach-of-contract claim, and remand the issue to the trial court for entry of summary disposition in the State and the State Employer's favor.

INTRODUCTION

Facing an unprecedented budget deficit for fiscal year 2011 (FY '11), with a $1.2 billion general-fund shortfall, then-Governor Jennifer Granholm and State Employer Sharon Bommarito sought substantial employee concessions from exclusively represented employees. The severity of the looming budget crisis also rendered any pay increase impossible for non-exclusively represented employees (NEREs), despite a 2007 agreement with certain limited-recognition organizations in which the Governor and State Employer promised to recommend a 3% base increase for NEREs for FY '11. Faced with the consequences of this deficit, the Governor and State Employer rejected the earlier agreement and requested that the Coordinated Compensation Panel recommend no FY '11 pay increase for NEREs.

The Coordinated Compensation Panel ignored the Governor's and State Employer's position and on its own made the recommendation that the limited-recognition organizations sought—a 3% increase for NEREs. The Civil Service Commission, however, exercised its own independent judgment and wisely rejected the Panel's recommendation, recognizing the State's fiscal crisis and the impact such an increase would have—not only on the budget but also on the continuing discussions with labor representatives of other state employees. This coordinated compensation process is within the constitutional authority of Michigan's Civil Service Commission.

Unsatisfied with this outcome, MAGE, a limited-recognition organization, filed with the Commission an unfair-labor-practice action against the State

Employer based on the rejection of its 2007 consensus agreement. While the action was still proceeding through the administrative process, MAGE filed this action in the Court of Claims alleging, among other claims, a breach-of-contract action against the State based on the exact same incident—the rejection of the 2007 agreement. Denying the State's motion for summary disposition on this claim, the trial court recognized a common-law right of contract and thus created a remedy apart from the process established by the Commission under its constitutionally granted authority over the compensation process for state employees. And it did this in a case where the promised recommendation of a 3% increase was actually considered and rejected by the ultimate decisionmaker, the Commission.

Considering the case as on leave granted, the Court of Appeals affirmed this unconstitutional circumvention of the Commission.

The Court of Appeal's decision should be immediately reviewed by this Court:

- This issue has significant public interest in that it involves pay-setting for public employees, the ability of the State to respond quickly and decisively to a budget crisis, and the best use of tax dollars during a period of state-wide fiscal crisis at all levels of government. Because this case is one against the State and its State Employer involving the pay-setting process regulated by the Civil Service Commission, it warrants this Court's review. MCR 7.302(B)(2).

- The issue presented here is of major significance to the State's jurisprudence. The Commission not only controls the pay-setting process and the compensation for State employees but also establishes the rules under which MAGE is recognized and participates, as well as the process to enforce its rights, and the remedies available for violations of those rights. Applying common-law contract principles conflicts with the Commission's constitutional authority and Rules governing this process. MCR 7.302(B)(3).

The State and its State Employer respectfully request that the Court grant this application for leave to appeal, reverse the decision of the Court of Appeals, and remand this claim to the trial court for entry of judgment for the State on this remaining claim.

STATEMENT OF FACTS

MAGE and its place in the civil-service system

The Michigan Association of Governmental Employees (MAGE) is a limited-recognition organization (LRO) recognized by the Civil Service Commission (CSC) pursuant to its constitutional authority to regulate the terms and conditions of employment for state employees. Const 1963, art 11, § 5; Civil Service Rule 6.2-2. Employees in excluded positions are not eligible for exclusive representation by a recognized labor union. Civil Service Rule 6-8.3. Instead, these non-exclusively represented employees may join and be represented by a limited-recognition organization such as MAGE, unless otherwise prohibited. Civil Service Rule 6-8.3. An organization granted limited recognition by the Commission may:

- express the interests of its members;
- represent its members in civil-service grievance hearings and technical appeals, when requested by the member; and
- be heard by the employer, the employment relations board, and the Commission. Civil Service Rule 6-8.3(b).

The Civil Service Rules prohibit these LROs and their members from participating in the Commission's collective-bargaining process. The Commission separately determines the salaries and benefits for NEREs through its Coordinated

Compensation Plan process. Civil Service Rule 5-1. Typically during this pay process, the LROs and the State Employer submit their respective positions regarding salary increases and other compensation for NEREs to the Coordinated Compensation Panel. Hearings are then conducted before the Coordinated Compensation Panel, and then the Panel decides what recommendation concerning changes to rates of compensation it will make to the Commission. Civil Service Rule 5-1.3.

The 2007 consensus agreement

In 2007, the State Employer entered into a consensus agreement with MAGE and other LROs concerning compensation for the next three fiscal years. The consensus agreement reflected a coordinated approach by the LROs and the State Employer. They agreed to submit predetermined salary and benefit recommendations for NEREs to the Coordinated Compensation Panel over the next three fiscal years. (Dkt 49, Defs' Motion for Summary Disposition, Ex 1, Consensus Agreement.) The LROs and State Employer agreed to recommend a 0% base-rate increase for NEREs for FY '09 (which began October 1, 2008); a 1% base-rate increase for FY '10; and a 3% base-rate increase for FY '11. The parties also agreed not to submit any proposals to the Coordinated Compensation Panel without the mutual written agreement of all parties. Consistent with the consensus agreement, the LROs and the State Employer submitted recommendations to the Panel for fiscal years '09 and '10. But intervening events rendered the State's support for the FY '11 recommendation impossible.

The budget crisis

The State Employer, the State Budget Director, the Governor's Legal Counsel, and other budget officials met in early December 2009 to discuss the FY '11 budget crisis. According to Deputy State Employer Hall, this budget crisis was "unusual" and had "potential serious consequence to the state budget." (Dkt 49, Defs' Motion, Ex 4 at 77, 78, 92.) Because this meeting did not yield a decision on the wage recommendation, the State Employer and the LROs met on December 21, 2009, to discuss the FY '11 recommendation. (Dkt 49, Defs' Motion Ex 4 at 44, 73, 83, 84, 113.) At this meeting, the State Employer informed the LROs, including MAGE, that she might not be able to support the 3% increase because of the State's economic issues. (Dkt 49, Defs' Motion Ex 4 at 44, 73.)

Later that day, the State Employer finalized her decision and submitted a position statement to the Panel. (Dkt 49, Defs' Motion Ex 1 – Bommarito letter and Ex 4 at 73, 76, 87, 112.) The position statement acknowledged the 2007 consensus agreement, but, given Michigan's economic downturn and an anticipated general fund shortfall for FY '11 of approximately $1.2 billion, the State Employer recommended no compensation increase be approved for NEREs.

The affected LROs, including MAGE, filed motions with the Coordinated Compensation Panel requesting that it reject the State Employer's position. (Dkt 49, Def's Motion Ex 3.) The Panel granted that relief, rejecting the State's position and instead recommending (as MAGE wanted) that the Commission include a 3% increase for NEREs for FY '11. (Dkt 49, Defs' Motion Ex 3.)

The Commission did not approve the Compensation Panel's recommendation. (Dkt 49, Defs' Motion Ex 9 at 6.) Instead, the Commission adopted an amended Coordinated Compensation Plan that contained no increase for NEREs for FY '11. (Dkt 49, Defs' Motion Ex 10.)

Administrative civil-service proceedings

The LROs, including MAGE, filed unfair-labor-practice charges against the State pursuant to Civil Service Rule 6-13. (Dkt 49, Defs' Motion Ex 9.) The charges alleged violations of Civil Service Rules 5-1, 6-2.2, 6-5, 6-8, and 6-11, of CSC Regulations 6.01 and 6.06, and of article 11, § 5 of the 1963 Constitution. (Dkt 49, Defs' Motion Ex 9.) MAGE also supplemented its original unfair-labor-practice charges, based on the State Employer's pay presentation to the Commission after the Compensation Panel's recommendation. (*Id.*)

After a hearing on the unfair labor practices, a hearing officer found that the State Employer violated Rules 6-11.1, 6-11.2, and 6-13 by the repudiating the consensus agreement. (Dkt 49, Defs' Motion Ex 9 at 36.) The hearing officer directed the employer to cease and desist from failing to abide by the terms of the 2007 consensus agreement, directed the employer to post a notice of a finding of unfair-labor-practice charges and the remedy at places in the worksite where

notices to employees are regularly posted and on its website; and awarded the LROs reasonable attorney fees, the amount to be determined later.[1] (*Id.* at 38.)

PROCEEDINGS BELOW

MAGE filed this action on May 12, 2010, while the unfair-labor-practice charges were pending and only six days before their hearing. (Dkt 1, Summons.) The three-count complaint alleged breach of contract (Count I), unjust enrichment (Count II) and equal-protection violations (Count III). (Dkt 1, Complaint.)

At a June 1, 2011 hearing on the parties' cross-motions for summary disposition, the trial court made the following rulings:

- The court has concurrent jurisdiction over the breach-of-contract claim (Hr'g Tr at 5, 6);
- Because the court had concurrent jurisdiction, exhausting administrative remedies was not necessary (Hr'g Tr at 6);
- The claim is not moot because not all available relief has been granted and could not be granted in the administrative process (Hr'g Tr at 6);
- The parties have authority to enter into consensus agreements; valuable consideration was given in exchange for the promise to recommend a wage increase for FY '11 (Hr'g Tr at 8);
- The plaintiff has standing to bring this action (Hr'g Tr at 9);
- The State Employer's performance of the terms of the consensus agreement was not objectively impossible because of the State's economic crisis; all that was contracted for was a recommendation; there was no impossibility based on the economy to follow through with the agreement and make the recommendation; the economy did not make it impossible, or extremely and unreasonably difficult to make a mere recommendation as agreed to (Hr'g Tr at 9, 10).

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[1] The award of attorney fees was subsequently reversed by the Commission. The State Employer did not challenge the substantive findings and relief ordered by the hearing officer.

The trial court accordingly granted partial summary disposition to MAGE on its breach-of-contract claim, though granting summary disposition to the State on the other claims. (Dkt 73, 6/15/11 Order.)

Addressing the State's appeal following this Court's remand as on leave granted, the Court of Appeals concluded that the doctrine of primary jurisdiction did not apply because the Commission "possesses no superior knowledge or expertise" with regard to contract law. Similarly, it concluded there was no need for MAGE to exhaust administrative remedies provided by the Commission because the Court of Claims had concurrent jurisdiction. Although the Commission has already rejected the Panel's recommendation of a 3% increase, the court did not think the issue was moot because MAGE did not receive any remedy for the alleged breach of contract. It also rejected the State's arguments that MAGE was not competent to contract and decided that MAGE did provide consideration. It concluded that it was not impossible for the State Employer to make a recommendation for a 3% increase because it was just a recommendation. And it concluded that causation was a question of fact to be decided at trial.

STANDARD OF REVIEW

Whether a court has jurisdiction is a question of law that is reviewed *de novo*. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). Additionally, this Court reviews the grant of summary disposition under MCR 2.116(C)(8) and (10) *de novo*. *Maiden v Roswood*, 461 Mich 109, 119–122; 597 NW2d 817 (1999). Accordingly, all issues here are subject to *de novo* review.

ARGUMENT

I. The trial court lacks jurisdiction over the complaint, which, alternatively, fails to present a justiciable claim.

A. The doctrine of primary jurisdiction bars the trial court's jurisdiction.

Michigan recognizes and applies the doctrine of primary jurisdiction. The doctrine limits a court's jurisdiction to consider matters that are administrative in character and prescribed by law to an agency's regulation and expertise. *Travelers,* 465 Mich at 194. The doctrine of primary jurisdiction applies to the Civil Service Commission. *Id.*, citing *Abel v Behrendt,* 320 Mich 616, 621; 32 NW 2d 4 (1948). Indeed, applying it to the Commission comports with the Constitution's specific grant of authority to the Commission over state employment. Const 1963, art 11, § 5; *Viculin v Dep't of Civil Service,* 386 Mich 375, 393, 394, 399; 192 NW 2d 449 (1971).

The doctrine reflects practical concerns regarding respect for the agency's regulatory duties, reinforces the expertise of the agency to which the courts are deferring, and "avoids the expenditure of judicial resources for issues that can better be resolved by the agency." *Travelers,* 465 Mich at 197. But the doctrine is not just about expertise; it is "grounded in the principle of separation of powers." *Id.* at 196. It "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.*" *Id.* at 198 (emphasis added).

While the Court of Appeals concluded the doctrine did not apply because "breach of contract involves an area of law for which the [Commission] possesses no superior knowledge or expertise" (COA Order at 3), this Court has applied the primary-jurisdiction doctrine to agencies facing breach-of-contract claims relating to their rules. For example, in *Travelers* this Court held that the Michigan Public Service Commission "clearly possessed the authority and expertise to consider Travelers' breach of contract claims" brought under an MPSC tariff rule. 465 Mich at 203. That is parallel to the situation here: the Civil Service Commission has the authority and expertise to consider MAGE's breach-of-contract claims brought under the Civil Service Rules.

Indeed, this Court has recognized that even tort claims relating to a contractual relationship governed by an agency should be decided first by the agency. In *Rinaldo's Construction Corp. v Michigan Bell Telephone Co,* 454 Mich 65; 559 NW2d 647 (1997), this Court held that "the doctrine of primary jurisdiction *requires dismissal* of plaintiff's [tort] claim," even though that claim could "proceed in a court of general jurisdiction," "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 *Rinaldo,* MAGE's claim "arises solely out of the contractual relationship between the [employer] and the plaintiff, [MAGE], and is limited by [an agency rule]." *Id.* at 67. The existence, terms, and conditions of that relationship are created and governed exclusively by the Commission under its constitutional authority. Therefore the doctrine of

primary jurisdiction "requires dismissal" of this contract claim arising exclusively out of that relationship. *Id.*

Applying the separation-of-powers principles underlying the doctrine compels the conclusion the trial court erred in exercising jurisdiction. First, MAGE exists and operates only within the limited sphere authorized by the Commission. Second, the Commission provides a specific, exclusive remedy for the employer's alleged unfair labor practice—the presentation of an alternate pay position without the "meet and confer" required by the consensus agreement. Third, only the Commission may fashion a remedy for alleged breach of an agreement authorized by its Rules. Fourth, no common-law principles separately apply to the Commission's approved pay process in which MAGE is but a limited participant. Const 1963, art 11, § 5.

The Court of Claims, a court of limited jurisdiction, must defer to this expertise and this process. The Commission has primary jurisdiction to determine whether an enforceable contract exists between the parties based on the Commission's rules; whether a breach of contract (i.e., an unfair labor practice) has occurred; and the best remedy for that violation. Only appellate jurisdiction—to review the final agency decision—may be invoked under the circumstances of this case. Const 1963, art 6, § 28; *Viculin,* 386 Mich at 385. And that jurisdiction lies in the circuit court, not the Court of Claims. MCR 7.105; MCL 600.6419.

B. MAGE failed to exhaust administrative remedies.

The rule requiring exhaustion of administrative remedies is "closely related" to the primary-jurisdiction doctrine and applies where a claim "is cognizable in the first instance by an administrative agency alone." *Travelers,* 465 Mich at 197. Judicial interference is "withheld until the administrative process has run its course." *Id.* Again, that "judicial interference" is limited to appellate review of the final agency decision. *Id.*; Const 1963, art 6, § 28.

Because this Court has explained that when primary jurisdiction applies, it "requires dismissal," *Rinaldo,* 454 Mich at 67, MAGE's claim is not cognizable in the Court of Claims. Contrary to the Court of Appeals' conclusion (COA Order at 3), it is cognizable by the Commission alone.

This outcome makes sense because the Commission has constitutionally mandated power to establish the terms and conditions of employment for the State's civil service. This includes the authority to determine and regulate the relationship between the employer, employees, and their representative organizations. Const 1963, art 11, § 5; *Mollett v Taylor,* 197 Mich App 328, 337; 494 NW2d 832 (1992); *Bonneville v Michigan Corrections Org,* 190 Mich App 473, 476; 476 NW 2d 411 (1991); *Bays v Dep't of State Police,* 89 Mich App 356, 360-361; 280 NW 2d 526 (1979). The remedies available under the Commission's rules and regulations must first be exhausted before a plaintiff may file a civil action. *Bays,* 89 Mich App at 360, 361; *Mollett,* 197 Mich App at 337. There are no damages that naturally flow from the "breach" of the consensus agreement beyond the unfair-labor-practice determination under the Commission's Rules. Because MAGE is a creature of the

Commission's Rules, because the "agreement" is a creature of the Commission's Rules and process, and because the remedy is prescribed by the Commission's Rules, exhaustion of the available administrative remedy must occur.

The only circumstances under which this exhaustion requirement may be avoided are when a final agency decision or order would not provide an adequate remedy; or if pursuing the administrative remedy would be an exercise in futility. *Bonneville,* 190 Mich App at 475; *Manor House Apts v Warren,* 204 Mich App 603, 605; 516 NW 2d 530 (1994). MAGE did not allege or provide any evidence supporting the application of either of these exceptions. The trial court made no findings consistent with these exceptions, holding only that because it had concurrent jurisdiction, exhaustion was not required. (Hr'g Tr at 6.) That conclusion, affirmed by the Court of Appeals, was an error of law.

For example, while this Court recognized a concurrent-jurisdiction theory in *Demings v Ecorse,* 423 Mich 49; 377 NW 2d 275 (1985), that case involved not primary jurisdiction, but exclusive jurisdiction. The *Bonneville* court thus appropriately concluded it did not apply to claims brought by state civil-service employees. *Bonneville,* 190 Mich App at 477. The *Bonneville* court reached this conclusion because "the Civil Service Commission has constitutionally mandated power over its employees and has ultimate authority to establish grievance procedures for them. Therefore, the rationale in *Demings* is inapplicable . . . ." *Bonneville,* 190 Mich App at 477. For these same reasons, this Court should

similarly reject extending the concurrent-jurisdiction doctrine to this claim by an LRO on behalf of its state civil-service members.

Here MAGE failed to exhaust the available administrative remedies before this case was filed. Indeed, the unfair-labor-practice action, which is based on the same facts and transactions as this breach-of-contract claim, was pending when this action was filed. And MAGE prevailed in the unfair-labor-practices administrative proceeding. To justify judicial intervention before exhaustion, "something in the nature of the action or proceeding" must indicate the court will not be able "to protect the rights of the litigants or afford them adequate redress otherwise than through the exercise of this extraordinary jurisdiction." *L & L Wine and Liquor Corp v Liquor Control Comm,* 274 Mich App 354, 360; 733 NW 2d 107 (2007). MAGE has not alleged the civil-service process resulted in an inadequate remedy. MAGE simply wants more than the system provides in the way of a remedy.

Finally, neither the trial court nor MAGE has identified any available remedies other than those obtained in the Commission's process. In fact, MAGE *received* the pay recommendation from the Coordinated Compensation Panel that it sought—a 3% base rate increase for NEREs. No remedy exists at law that has not been accorded MAGE in the administrative process.

C. MAGE's claims are moot.

MAGE's breach-of-contract claim is moot because there is no longer a controversy requiring judicial resolution. *State News v MSU,* 481 Mich 692, 703 n 2; 753 NW 2d 20 (2008). One aspect of mootness is "the court's ability to fashion

appropriate and effective relief to resolve the alleged controversy." *East Grand Rapids Sch Dist v Kent County Tax Allocation Bd*, 415 Mich 381, 391; 330 W 2d 7 (1982). Thus, an issue is moot when a subsequent event renders the grant of any relief impossible. Here, a number of such events have occurred rendering this action moot.

First, MAGE made its presentation to the Coordinated Compensation Panel in February 2010. The Panel awarded all the relief that MAGE sought: the Panel gave effect to the consensus agreement and rejected the State's position statement. The Panel then recommended the 3% increase for NEREs to the Commission. (Dkt 49, Defs' Motion Ex 9 at 5.) MAGE thus received the "benefit of its bargain" under the terms of the consensus agreement. As the hearing officer and the trial court both acknowledged, the reason MAGE did not get increase was that the consensus agreement (and even the Panel's recommendation) did not bind the Civil Service Commission. (Dkt 49, Defs' Motion Ex 9 at 5; Hr'g Tr at 10.) In other words, the consensus agreement did not compel the Panel to recommend or the Commission to approve any base salary increase for NEREs. MAGE knew that when it entered into the consensus agreement. Thus, MAGE has received all that the consensus agreement could have hoped to achieve: a 3% increase recommendation from the Panel to the Commission.

Second, MAGE's claim is rendered moot by MAGE's victory in the unfair-labor-practice administrative proceeding. Thus, not only has the question of the State's repudiation of the consensus agreement been resolved by the appropriate

administrative agency, all available relief has already been obtained by MAGE. The trial court lacks the ability to fashion any additional remedy. No other "appropriate and effective" relief is available. No change in the FY '11 compensation for NEREs can be awarded because the Commission—the body with the ultimate decision-making authority under the Constitution—rejected the 3% increase. The consensus agreement is now expired, so, logically, no declaratory or equitable relief is available. The claim is, thus, moot in all respects.

II. MAGE's breach-of-contract claim fails as a matter of law.

MAGE's breach-of-contract claim fails because the 2007 consensus agreement does not constitute a judicially enforceable contract. A valid, judicially enforceable contract requires "parties competent to contract, a proper subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). Here, two essential elements are missing: MAGE is not competent to contract, and no consideration was given. And even if the contract were valid, MAGE's claim still fails because performance was impossible and because it did not suffer any damages as a result of the State's withheld recommendation, given that the Panel made the recommendation anyway and the Commission rejected that recommendation.

A. MAGE is not competent to contract

The Commission has given LROs only limited rights. The right to enter into contracts with the employer is not among them. Civil Service Rule 6-8.3(b).

Indeed, the only contract recognized under the Rules is a collective-bargaining agreement between an exclusive labor representative and the employer. Civil Service Rule 6-2.1(e). As a limited recognition organization, MAGE is prohibited from entering into binding agreements. Thus, MAGE, which derives its authority from the Commission and the Commission's Rules, is not competent to contract with the State Employer on a compensation or employment-relations matter. Accordingly, the 2007 consensus agreement cannot be considered a contract enforceable at law. MAGE is limited to the claims and relief provided by the Commission—in this instance an unfair labor practice.

The trial court concluded, and the Court of Appeals agreed, that the fact these parties had previously entered into consent agreements established: 1) they were authorized to enter into such agreements; 2) they were "competent" to contract; and 3) the agreement was in fact a contract enforceable at law. (Hr'g Tr at 7.) That analysis is erroneous. It ignores the fact the Commission's Rules and Regulations govern what is a competent, enforceable contract on the matter of compensation for civil-service employees. Nothing in the Rules prohibits the parties from reaching such agreements. But not all agreements are enforceable contracts, and nothing in the Rules makes these agreements enforceable contracts at law. The Rules contemplate collectively bargained agreements to be binding and enforceable only when ratified by the Commission. Civil Service Rule 6.2.1d.

Once ratified by the Commission, the contract is given the status of a Rule. It is then enforceable like any other Rule of the Commission. Further, the Rules

provide the only remedy available for enforcement of a contract recognized by the Commission. The lower courts ignored this process, the Commission's authority, and the applicable Rules, effectively circumventing the plenary authority of the Commission by treating MAGE as competent to enter binding contracts on matters of compensation.

B. No consideration was given or, alternatively, even if given, was illusory.

Examination of the allegations in the complaint, the facts, and the consensus agreement itself reveals that the parties gave no valuable consideration. The purpose for the 2007 consensus agreement was to present a predetermined "unified front" to the Compensation Panel on compensation recommendations for NEREs. (Dkt 49, Defs' Motion Ex 4 at 38.) The only promise made by either side was that they would be united in their presentation to the Panel. The idea that MAGE's members gave valuable consideration by "surrender[ing] the opportunity to lobby for larger compensation increases for its members" (COA Order at 4) is illusory at best. The Panel's decision is wholly discretionary, and both its decision and the parties' recommendations are subject to the Commission's ultimate authority.

For a promise to be consideration, it must have value to both sides and be enforceable. *Lawrence v Ingham County Health Dep't Family Planning/Pre-Natal Clinic*, 160 Mich App 420, 424; 408 NW2d 461(1987). Moreover, the promise must not be illusory. A promise that is voidable by one side is unenforceable and thus illusory. *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 244 n 12; 324 NW 2d 732

(1982). If a promise cannot be enforced, there is no consideration and no contract exists as a matter of law. This is true regardless of whether the parties consider the agreement binding.

Here, MAGE asserted only in the most general terms that valuable consideration was given by its members. (Dkt 1, Complaint ¶¶ 7, 8.) It does not identify the specific consideration on which it relies in support of this claim. Additionally, MAGE could have no reasonable expectation the Commission would approve the recommended base salary increase in any given year. Unlike a ratified collectively bargained agreement, there is no contractual obligation to approve or provide any pay increase for MAGE's members. While the State Employer's position statement was subsequently determined to constitute an unfair labor practice—because of a failure to meet and confer in good faith as required by Civil Service Rule—it represents a legitimate change in position resulting from the unprecedented State budget deficit for FY '11.

C. Any breach of contract is excused because performance became objectively impossible.

The dramatic decline in projected tax revenues for 2010 rendered the consensus agreement impossible to perform for the FY '11 pay process, excusing any breach of contract that might otherwise exist at law. *Bissell v L W Edison Co,* 9 Mich App 276, 284; 156 NW 2d 623(1967); *Roberts v Farmers Ins Exchange,* 275 Mich App 58, 73; 737 NW2d 332 (2007). The law "inserts into contracts a clause providing legal excuse from strict performance of the contractual promise in the

event that unanticipated circumstances beyond the contemplation of the contracting minds and beyond their immediate control make strict performance impossible." *Bissell,* 9 Mich App at 287.

Two kinds of legal impossibility are recognized: original and supervening. Supervening impossibility develops after the contract in question is formed. The party seeking to have performance excused need not show absolute impossibility. Rather, the party must show "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts,* 275 Mich App at 74.

Here, the facts clearly establish the supervening impracticability of performance created by the dramatic change in the economic status of the State after the consensus agreement was formed in 2007. The State faced a projected deficit of at least $1.2 billion for fiscal year FY '11. While the State could not avoid implementing the 3% increase required by the approved collective-bargaining agreements applicable for FY '11, it could recommend against increases for the NEREs. An additional 3% increase for NEREs at the time was clearly "impractical" because of the extreme and unreasonable expense it would impose on a budget that had to be trimmed by at least $1.2 billion.

The question whether a promisor's liability is extinguished in the event the contractual promise becomes impracticable to perform depends on whether the supervening event producing impracticability was reasonably foreseeable and within the contemplation of both parties when the contract was formed. *Vergote v K Mart Corp (After Remand),* 158 Mich App 96, 110; 404 NW 2d 711 (1987). The

dramatic economic changes between 2008 and 2010 were not reasonably foreseeable in 2007 when the consensus agreement was entered into. Nor would the impact of an additional 3% base salary increase for NEREs on a projected budget deficit of $1.2 billion for FY '11 be reasonably foreseeable in 2007. This "promise" became impracticable to perform for FY '11 and excuses any breach of contract the court might conclude had occurred as a result of the State Employer's changed position.

The Court of Appeals erred in concluding that this legal impossibility did not excuse performance because the obligation was only to "mak[e] a recommendation, which can be rejected." (COA Order at 4.) This is not a sound rationale. If the State cannot afford to pay a 3% increase to NEREs because of the existing fiscal conditions that did not exist and were not expected in 2007, it is impossible to make such a recommendation. Making such a recommendation under the existing conditions (1) would ignore the State's serious budget crisis; (2) could impact the on-going concession negotiations with other employee groups (recommending a 3% increase for NEREs would signal to those groups that increases were possible); (3) would, without a doubt, send the wrong message to the Coordinated Compensation Panel, the Commission, all employee groups, and the public; and (4) could have resulted in the Commission's adoption of that 3% increase.

D. MAGE failed to establish a claim for breach of contract when it failed to establish that the State's alleged breach caused it to suffer any damages.

MAGE's breach-of-contract claim must fail as a matter of law as it cannot prove any damages that flow from the alleged breach of contract. To establish a

breach of contract, a plaintiff must establish both the elements of a contract and a breach of the contract. *See Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract requires parties competent to contract, a proper subject matter, legal consideration, and mutuality of agreement and obligation. *Struggles*, 289 Mich at 599. The plaintiff must then establish the breach of the contract that damages resulted from (i.e., were caused by) the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

MAGE cannot establish damages for several reasons. First, the record in this case establishes that the lack of the State's recommendation could not have been the cause that the 3% increase did not occur. The whole point of the desired recommendation from the State was to persuade the Coordinated Compensation Panel to recommend the increase to the ultimate decisionmaker, the Civil Service Commission. That recommendation actually occurred, and then the Commission rejected it. The Commission's exercise of its own judgment caused the denial of the increase. It is like arguing that a trial court's rejection of a legal argument causes some harm in a situation where the intermediate appellate court accepted the argument and then was reversed by a supreme court. The reason the argument failed is that the ultimate decisionmaker rejected it.

Second, the only benefit MAGE bargained for, if a valid contract was established, is for a joint recommendation to the Panel concerning wage increases for NEREs for FY '11. There is no dispute that MAGE received that benefit—the Panel rejected the State's attempt to repudiate the consensus agreement and

accepted the consensus agreement in its entirety. Therefore, MAGE received the benefit it "bargained for." Indeed, the Court of Appeals itself recognized that the recommendation did not cause the ultimate outcome: "a recommendation . . . can be rejected." (COA Order at 4.) Precisely because a recommendation can be rejected—and was here, by the Commission—the lack of a recommendation changed nothing and therefore caused no damages.

What MAGE did not bargain for was (1) a recommendation from the Panel (as opposed to from the State) for a 3% wage increase for NEREs for FY '11 nor (2) a guarantee for a 3% wage increase for NEREs for FY '11. But MAGE nonetheless received the recommendation from the Panel for a 3% wage increase for NEREs for FY '11. While MAGE expected the Commission to follow past practice and accept the Panel's recommendation, the Commission instead tied 2-2 on the 3% increase, and as a result the *status quo*—no wage increase—continued. This leads to another reason why MAGE cannot establish damages for the alleged breach of contract.

The Court of Claims cannot award any relief that MAGE has not received already from the unfair labor practice decision by the Commission. Attorney fees are not available for a breach-of-contract claim in this forum. *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 430-431; 528 NW2d 749 (1995). But more importantly, the Court of Claims cannot award the 3% wage increase for NEREs for FY '11.

Only the Commission has the power and authority to "fix rates of compensation for all classes of positions . . . and regulate all conditions of

employment in the classified service." Const 1963, art 11, § 5; *AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1, 17; 818 NW2d 337 (2001). It is the Commission, not the Legislature, and not the courts, "that is given "supreme power" over civil-service employees under article 11, § 5 of the Constitution. *Crider v State*, 110 Mich App 702, 723; 313 NW2d 367 (1981).

Because only the Commission is constitutionally authorized to set rates of compensation, the Court of Claims lacks the authority to award MAGE, its members, or any NEREs the 3% wage increase for FY '11 that the Commission rejected. Since no damages flow from the alleged breach, MAGE has failed to state a cognizable claim for breach of contract. *Alan Custom Homes*, 256 Mich App at 512.

Alternatively, the only remedy available to MAGE was to have the State's attempt to repudiate the consensus agreement voided by the Panel, which in fact happened when the parties went before the Panel in 2010.

CONCLUSION AND RELIEF REQUESTED

This case involves threshold jurisdictional questions of significant practical and legal significance both to the State and its employees. The State Defendants respectfully request this Court 1) grant this application; 2) reverse the Court of Appeals' disposition on this breach-of-contract claim; 3) and remand to the trial court with instructions to grant summary disposition to the State on this claim.

Respectfully submitted,

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