

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals

Cooper, P.J., and Hoekstra and Smolenski, J.J.

LOCAL 376, PONTIAC FIRE FIGHTERS UNION,

Plaintiff,

Supreme Court No. 132916

COA 271497

Oakland CC: 2006-075367-CL

v.

CITY OF PONTIAC, a Municipal corporation,

Defendant.

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**DEFENDANT-APPELLANT CITY OF PONTIAC'S
REPLY BRIEF ON APPEAL**

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REPLY TO STATEMENT OF FACTS¹

In addressing the notice given to the Union about forthcoming layoffs, the Union now suggests that the City did not give such notice “at the bargaining table” (Union’s Brief, p 4). This is apparently designed to suggest that Human Resources/Labor Relations Director Larry Marshall’s testimony at the MERC hearing, held long after the trial court’s decision, undermined his Affidavit presented to the trial court. The Union further states (p 5) that the City did not “announce to the Union an actual intent to lay off firefighters until June 6, 2006.”

To the contrary, Mr. Marshall’s testimony at the MERC hearing and his affidavit are entirely consistent with one another. In fact, Mr. Marshall testified that he held several informal discussions about layoffs with Union President Rick Luxon prior to the formal notice given on June 1, 2006 (Appx 176a, MERC Hearing Transcript, p 38). Once the layoff decision was made, he further testified, he expressly informed the Union of that decision:

A . . . Finally, it got to the point where we had to go into our police and fire departments and initiate layoffs.

Q And was Mr. Luxon aware that that would be coming in April or May?

A Yes, he was (Appx 177a, MERC Hearing Transcript, pp 39-40).

Consistently, Mr. Marshall attested that he notified the Union approximately 60 days in advance of the layoffs (Appx 122a, Larry Marshall Affidavit).

The Union also repeatedly suggests that the City has wrongfully refused to arbitrate a grievance over the layoffs. In particular, the Union states that it has requested arbitration on the record at the trial court’s injunction hearing and in subsequent correspondence.

¹ The Union’s Statement of Facts generally does not contest the Statement of Facts contained in the City’s Brief on Appeal. It merely raises a few issues which are largely impertinent to this appeal.

However, as the City maintains in its principal Brief, there is nothing to arbitrate. The Union properly admits in its Brief, at page 14, that the decision to lay off firefighters is a permissive subject of bargaining. The City again made clear to the Union after the trial court's injunction that the no-layoffs provision was no longer in effect. The City's counsel wrote to the Union's attorney that because there had been no layoffs and "the City has withdrawn the permissive layoff provision from the contract," there was "nothing to arbitrate" (Ex. 1 hereto). The Union cannot disagree with this proposition. The trial court's injunction has continued to prohibit layoffs in any event.

The Union acknowledges the City's severe financial crisis. However, the Union cites to an appropriations ordinance, adopted on June 29, 2006, to support the assertion that the City's concerns about financial distress are somehow overstated. The ordinance states as follows: "This ordinance requires that the Fire Department shall implement Fire EMS transport no later than September 1, 2006. The revenue generated will defray the personnel costs of the restored positions."² The ordinance did not set forth a specific appropriation for firefighters and did not indicate how long the costs were being temporarily "defrayed." In fact, the EMS transport system has cost the City much more money than it generated. It also did not prohibit layoffs.³ In any event, the ordinance was not part of the trial court record.

In further support of its position, the Union makes allegations about the parties' bargaining history, including claims that the Union proposed cost savings at the bargaining table and that the Union proposed a "revenue-generating component" (EMS transport) to

² The Union accurately states that the Court of Appeals refused to strike the Ordinance from the record. Nevertheless, this Court should not consider the Ordinance in determining whether the trial court abused its discretion in granting the injunction, because that Ordinance was not before the trial court. The Ordinance was adopted after the trial court's hearing.

³ Nor did the ordinance divest the personnel function from the City's executive branch.

which the City allegedly did not respond (Union's Brief, p 4).⁴ These allegations also were not presented to the trial court.⁵

ARGUMENT

Standard of Review.

The Union does not dispute that the appropriate standard of review is whether the trial court abused its discretion. The Union further concedes (p 9) that where the trial court misapprehends the law to be applied, it abuses its discretion.

However, the Union maintains that the Court of Appeals owed considerable deference to the trial court's finding of irreparable harm even though the trial court relied solely upon a written record.⁶ The Union thus attempts to distinguish case law cited by the City.

The Union's distinctions are insignificant. With respect to the decision in *Aaron v Michigan Boiler & Engineering*, 185 Mich App 687; 462 NW2d 821 (1997), the Union emphasizes the Court's holding that the Workers Compensation Appellate Commission owed no deference to the Magistrate's findings on a written record because the Appellate Commission and Magistrate were part of the same agency and had the same expertise. The same is true here. The Court of Appeals held no less expertise in reviewing a printed record in an injunction than did the trial court.⁷

⁴ As noted above, in the ordinance relied upon by the Union, the City did implement EMS transport, in an unsuccessful effort to increase revenues.

⁵ By contrast, the City presented substantial evidence to the trial court of the economic crisis facing the City (See Affidavit of J. Edward Hannan (Appx, pp 125a-127a).

⁶ The Union further states that it was prepared to present live testimony. That misses the point. The trial court's injunction rested upon the error that no evidence was presented to contradict the City's evidence that the firefighters did not face immediate threat of irreparable injury.

⁷ The Union also points out that the Workers Compensation Appellate Commission was bound by the "any competent evidence" standard, but the Union fails to explain how that standard affects the level of deference owed by the Court of Appeals in this case.

The Union acknowledges that this Court’s statement about the lack of deference owed in appellate review of a printed record⁸ is “arguably instructive,” but says it is not “controlling.” Specifically, the Union writes (p 10) that the Court of Appeals gave appropriate deference to the trial court because of “documentary evidence in the record.” However, the Union presented no documentary evidence of irreparable harm but, instead, merely a verified complaint made upon “information and belief” and replete with generalizations. The Court of Appeals thus clearly erred in deferring to the trial court.

The Union also suggests that the City should be barred from relief due to “unclean hands” and cites the City’s alleged refusal to accept expeditious arbitration of the layoffs. As explained above, and as the Union has been notified, however, there is nothing to arbitrate.

I. THE TRIAL COURT CONCLUDED IN ERROR THAT THE UNION COULD SUCCEED ON THE MERITS OF COUNTS I AND II BECAUSE, WHEN THE CITY ANNOUNCED LAYOFFS, THE FORMAL CONTRACT EXPIRED AND THE PARTIES WERE OPERATING UNDER AN AGREEMENT WHICH WAS TERMINABLE AT WILL.

The Union suggests that no single factor is determinative in deciding whether injunctive relief should issue. While it is true that courts must weigh all factors, there is no dispute that irreparable injury must exist. See e.g., *Head v Phillips Camper Sales and Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999) (“Thus, a real and imminent danger of irreparable injury must exist to support a grant of injunctive relief”) (emphasis added).

The No-Layoffs Provision Could Be, And Was, Lawfully Withdrawn.

The Union does not dispute that an automatic renewal provision in a collective bargaining agreement is terminable at will. *Pinckney Community Schools*, 1994 MERC Lab Op 376

⁸ *Palenkas v Beaumont Hospital*, 532 Mich 527; 443 NW2d 354 (1989).

(Appx 14a-29a, MERC Opinion in *Pinckney*), aff'd on other grds, 216 Mich App 363; 548 NW2d 713 (1996). However, the Union attempts to distinguish *Pinckney* on the grounds that the collective bargaining agreement at issue in the instant case was not for an indefinite duration because it provided for automatic, daily extensions after its expiration on June 30, 2004 "until a new contract is negotiated or ordered."

In particular, the Union maintains that the agreement is of a definite, rather than indefinite, duration because the "or ordered" language implicitly refers to interest arbitration under Act 312, 1969 PA 312, MCL §423.231 *et seq.*⁹ The Union argues that Act 312 "sets forth definite time limits for conducting arbitration proceedings" (Union's Brief, p 22) and that this places a definite duration on the duration of the contract.¹⁰

This argument is erroneous. First, there is no guarantee in any instance that Act 312 arbitration will take place at all. In many instances, employers and unions reach agreement on successor agreements before the machinery of Act 312 is invoked. Arbitration under the act requires that either the union or employer initiate proceedings under the Act. MCL §423.233. Indeed, in this case, no Act 312 petition was filed during the course of the trial court proceedings and the trial court was informed that no Act 312 petition had been filed (See Appx pp 139a-140a, Trial Court Hearing Transcript, pp 6-7). Therefore, Act 312 proceedings under the contract were only a speculative possibility, not an event of a definite duration.

Second, even if Act 312 were invoked in the course of the negotiation of all police and fire contracts (and it is not), that fact also would not impose a definite duration on the

⁹ This is not necessarily the only interpretation that the "or ordered" language affords. The clause does not in any way identify or specifically refer to Act 312.

¹⁰ Under Act 312, an arbitrator and two panel delegates hold hearings after the parties reach impasse in their negotiations. The panel rules on the outstanding issues being negotiated, determining which proposals to adopt (economic issues) or how to craft the contract provisions in dispute (non-economic issues).

contract. Although Act 312 does contain a timeline for initiation of hearings after appointment of the arbitrator, MCL §423.236, and states that hearings will be completed within 30 days of initiation “unless otherwise agreed by the parties,” *id.*, such hearings are rarely completed within 30 days.¹¹ Such proceedings are often not completed for over a year. Additionally, parties may attempt to negotiate contracts during the ongoing course of the Act 312 proceedings and agree to delay the issuance of the decision. Moreover, the statute does not require that decisions be issued within any specific period of time after conclusion of the hearing. Finally, the order of an Act 312 panel is subject to appeal and enforcement by court order, MCL §423.240, the timeline for which is also unpredictable. For all of these reasons, the Union’s attempt to distinguish the facts of *Pinckney* from the instant case are without avail.

The Union states that the City did not give notice of its intention to terminate the entire agreement and did not give the length of notice required by *Pinckney* (Union’s Brief, p 23). This is untrue. First, the Affidavit of Mr. Marshall and his testimony at the MERC hearing both make clear that the City gave notice 60 days in advance of the layoffs that layoffs would be occurring (Appx 177a, MERC Hearing Transcript, pp 39-40; Appx 122a, Larry Marshall Affidavit). Indeed, under the contract itself, the Union waived any suggested need for a 60 day notice. The contract required the City to give only 14 days notice of layoffs (Appx p 49, Collective Bargaining Agreement, p 12). Therefore, there is no dispute that the Union had the requisite notice of the City’s intentions.¹²

¹¹ As the Union is aware, the parties routinely stipulate at the outset of the proceedings to the waiver of the 30-day completion requirement.

¹² The Union states that the City “stipulated” at the trial court hearing that it did not provide notice of intent to terminate. The record reflects otherwise. The City merely stipulated that it did not provide prior written notice at least 60 days before the intended layoffs (See Appx 143a, Trial Court Hearing Transcript, p 10).

Second, with respect to the allegation that the City did not terminate the entire agreement, the Union is making a distinction without a difference. As set forth fully in the City's principal Brief, an employer may withdraw a permissive subject of bargaining after expiration of the contract. In this case, because the agreement was indefinite and therefore terminable at will, the City could lawfully withdraw the no-layoffs provision -- and did so.

There Was No Contract Repudiation Because The "No-Layoffs" Language Was Terminable At Will And There Existed A Bona Fide Dispute Over Interpretation Of The Agreement.

The Union continues to maintain that the City's alleged violation of the no-layoffs provision constituted an unlawful repudiation of the contract under PERA. As previously explained, there existed a bona fide dispute in this case because, while the contract contained a no-layoffs clause, the contract also stated that 14 days notice would be given for layoffs and set forth the order in which employees could be laid off (Appx pp 49a and 88a).

In an effort to contradict this assertion, the Union purports to describe the history of contract language, particularly when the no-layoffs clause was adopted relative to those provisions which describe how and when layoffs may occur (Union's Brief, pp 3 and 19). No evidence of this alleged history was presented to the trial court and, therefore, it played no role in the trial court's decision.¹³ Nor did the trial court refer to it in the Opinion and Order.

In fact, at the MERC hearing on this specific issue, the Union presented no evidence on this subject (Appx pp 166a-185a, MERC Transcript). No evidence submitted indicated that the "no layoffs" provision was intended to supercede the other clauses which describe the orders and procedures for implementing layoffs or that the "no layoff" provision was put in the contract before or after the provisions defining the procedures to be used for layoffs.

¹³ Instead, the assertion (without supporting evidence) was made by the Union's counsel at the injunction hearing. Of course, such statements are not evidence.

In response to the argument that the repudiation charge is moot, the Union maintains that MERC will decide technically moot issues if an unlawful action is likely to recur. Since the Union has presented no evidence to MERC that the challenged action is likely to recur, the Union's suggestion is itself moot. Therefore, the Union did not demonstrate the requisite likelihood of success on the merits of its unfair labor practice charge.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING INJUNCTIVE RELIEF BECAUSE THE UNION FAILED TO PRESENT SUFFICIENT EVIDENCE OF IMMINENT IRREPARABLE INJURY TO THE FIREFIGHTERS BASED UPON AN ALLEGED INCREASED RISK OF HARM AND MONETARY LOSSES.

A. The Union Failed To Present Sufficient Evidence To Support Its Claim Of Increased Risk Of Harm To The Firefighters Who Would Not Be Laid Off.

The Union offers no response to the argument that it presented no actual evidence of real and imminent irreparable injury. As noted, the verified complaint (the only allegations of this sort that the Union presented) rested expressly upon information and belief (Appx 113a-120a, ¶9). The trial court abused its discretion in relying upon such allegations especially because the City presented specific admissible evidence of how the City would address the alleged safety concerns. This Court should not permit parties (employers or employees) to petition trial courts with unsubstantiated allegations and obtain relief of the sort granted in this case.¹⁴

The Union states that the irreparable injury “also extends into the intangible realm of the parties’ collective bargaining relationship” because reversal of the trial court’s findings would

¹⁴ The Union states (p 30) that “the City’s plan is directly contrary to accepted guidelines established by the National Fire Protection Association and U.S. Fire Administration recommendations which are designed to minimize the risk of serious injury at fire scenes.” It is difficult to respond to such allegations when the Union fails to cite to any specific “guidelines” or “recommendations” and since no such evidence was presented to the trial court.

render any arbitration or MERC proceeding moot (Union's Brief, p 30).¹⁵ The Union cites to no authority for the proposition an alleged¹⁶ "break in the parties' relationship" can be the basis for a finding of irreparable harm.

B. The Trial Court Abused Its Discretion In Issuing An Injunction To Prevent Layoffs Based Upon Alleged Irreparable Harm To Laid-Off Employees.

The Union argues that the trial court did not abuse its discretion in finding irreparable harm based upon the economic harm to laid-off employees. The Union claims that the City "wrongfully asserts that where money damages are available, irreparable injury sufficient to warrant injunctive relief is never present" (Union's Brief, p 29).

In support of this position, the Union cites only to language in *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984), where this Court noted that a civil service employee's unsupported allegations that she would be unable to pay rent, bills or support her son, and that she might be ineligible for unemployment benefits, did not justify the issuance of an injunction against her discharge.¹⁷ It is noteworthy that the Union in this case presented no evidence of any kind addressing its members' economic hardship or how it would differ in any way from other cases where an individual loses his/her employment.

C. The Trial Court's Injunction And The Court of Appeals Decision Affirming It Set Troubling Precedent.

The Union did not respond to the City's argument that, given the trial court's reliance upon a verified complaint made on "information and belief," public policy compels reversal.

¹⁵ Although, again not proven.

¹⁶ The Union ignores the remedial remedies available to MERC and grievance arbitrators.

¹⁷ The City does not dispute that, in an appropriate case, irreparable injury may be found based upon economic hardship "coupled with the prospect of destitution, serious physical harm, or loss of irreplaceable treasured possessions." *State Employees Ass'n, supra* at 168. The Union did not present such a case to the trial court.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFF ESTABLISHED THAT THE BENEFITS TO THE UNION OF GRANTING THE REQUESTED INJUNCTION WERE OUTWEIGHED BY THE HARM THE INJUNCTION WOULD IMPOSE UPON THE CITY.

The Union argues that the City's assertions of financial harm are "disingenuous." Instead of refuting the costs of the injunction, however, it argues that a fiscal crisis does not relieve an employer from its bargaining obligations. This has nothing to do with whether the trial court abused its discretion in balancing the harms.

The Union further argues that a budget ordinance "allocated funds" to "defray" the costs associated with maintaining staffing levels. As noted above, however, the ordinance did not set forth a specific appropriation for firefighters and did not indicate how long the costs were being temporarily "defrayed." Nor is there (or could there be) evidence that the defraying has actually been successful.

RELIEF REQUESTED

For the foregoing reasons, Defendant-Appellant City of Pontiac respectfully requests that this Honorable Court reverse the November 30, 2006, judgment of the Court of Appeals and vacate trial court's June 30, 2006, Opinion and Order.

Respectfully submitted,
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August 16, 2006

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*Re: City of Pontiac and Local 376, PFFU
Case No. 06-07536-CL*

Dear Mr. Gregory:

Thank you for your correspondence of July 15, 2006. I apologize for the delayed response. While I appreciate your desire to expeditiously arbitrate the layoff grievances, as I assume you know, the City has withdrawn the permissive layoff provision from the contract. Consequently, inasmuch as no layoffs have occurred and the pertinent provision is no longer part of the collective bargaining agreement, it is the City's position that there is nothing to arbitrate.

Very truly yours,

KELLER THOMA, P.C.


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