STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT,

Plaintiff/Cross Defendant-Appellant,

v

DETROIT FIREFIGHTERS ASSOCIATION LOCAL 334,

Defendant/Cross Plaintiff-Appellee.

UNPUBLISHED
March 16, 2004

No. 241312
Wayne Circuit Court
LC No. 01-138110-AA

Before: Owens, P.J., and Talbot and Murray, JJ.

PER CURIAM.

In this compulsory arbitration case, plaintiff, the City of Detroit, challenges the jurisdiction of the arbitration panel for awarding to a joint management-union committee the authority to establish the city's safety policy for fire fighters. We reverse the circuit court's order denying the city's motion for vacatur and granting the union's counterclaim, and we remand the issue to the arbitration panel for proceedings consistent with this opinion.

A. Facts and Procedural History

During negotiations for the 1998-2001 collective bargaining agreement, the city and defendant, the Detroit Firefighters Association, Local 334, encountered an impasse over a number of issues. Pursuant to Act 312, MCL 423.231 *et seq.*,[1] the union filed a petition with the Michigan Employment Relations Commission (MERC) for compulsory arbitration to resolve the outstanding issues. The MERC appointed Benjamin Wolkinson as the impartial chairman of the arbitration panel. The panel also included John King, the union's president, and Roger Cheek, the director of the city's Labor Relations.

The proceedings lasted almost four years. They involved over fifty days of hearings, and generated an estimated 7,500 pages of documents and hearing transcripts. The sole issue pertinent to this appeal is one proposal that the union submitted to arbitration. The union

[1] "Act 312" arbitration came into existence under 1969 PA 312.

proposed to amend Article 23(A) of the previous 1992-1998 collective bargaining agreement. Article 23(A) provided that the Joint Health and Safety Committee (JHSC) make recommendations to the fire commissioner related to the safety of personal fire fighter equipment and apparel and to safe work conditions. The JHSC was comprised of three appointed representatives of the city and three appointed representatives of the union. The fire commissioner would either accept or reject the recommendations. At arbitration, the union proposed to grant the JHSC actual decision-making power to establish the city's policies for fire fighter personal safety equipment and apparel, and safe working conditions.[2]

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[2] The arbitration panel adopted the union's proposal with slight modifications. The pertinent portions of the clause that the panel awarded are as follows:

> II. The Committee *shall have the power,* among other things, to:
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> (a) Review and analyze all reports of job-related accidents, deaths, injuries, and illnesses;
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> (b) Develop information on accident and injury sources and rates;
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> (c) Investigate Fire Department facilities and equipment to detect hazardous conditions or unsafe work methods, including but not limited to training procedures, and *cause them to be corrected*;
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> (d) Promote safety for all department members;
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> (e) Study hazardous material issues and equipment;
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> (f) Review specification for protective equipment apparatus, apparel and/or safety devices prior to letting out bids for new or renewal contracts for the purpose thereof.
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> (g) Review and recommend training procedures.
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> * * *
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> IV. The Committee shall have the authority, by a majority vote of its members (ie., four or more) *to set policy on*:
>
> (a) Changes to, additions to, purchase (and specifications) and testing of fire fighters' personal protective apparel and equipment.
>
> (b) Changes to, additions to, purchase (and specifications) and testing of equipment essential to the maintenance of safe living quarters.
>
> (c) Correction of unsafe or harmful working conditions, including the setting of a deadline for the abatement of such conditions, as they relate to fire fighters' personal protective equipment and the maintenance of safe living quarters.
>
> (d) The cleaning and testing of air compressors.
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> All policies/amendments adopted by the Committee shall be made to the Fire Commissioner in writing. [Emphasis added.]

The city persistently challenged the proposal on the ground that the arbitration panel lacked jurisdiction to decide the matter because the union's proposal impinged on the city's managerial prerogative to establish policy, which is not a mandatory subject of bargaining. Over the dissent of the city representative, the panel granted the union's proposal for two reasons. The first reason was that the binding policy decision powers of the JHSC would create a mechanism for a more rapid implementation of changes to unsafe working conditions and personal safety equipment. The second reason was that the public employer's prerogative to establish safety policy was preserved under the mechanism because, to make any binding policy decision, the JHSC would need the majority vote of four of the six committee members. The city could quash any proposal by directing the votes of its three representatives on the committee.

The city filed a complaint to vacate the relevant portion of the arbitration award, arguing that the panel exceeded its jurisdiction under Act 312. The union counterclaimed to enforce the award. The circuit court concluded that the panel properly exercised jurisdiction over the union's proposal and that the pertinent portion of the award was supported by competent, material and substantial evidence.

II. Standard of Review

This Court has the same standard of review as that of the circuit court. *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF ("Local 344")*, 204 Mich App 541, 550-551, n 10; 517 NW2d 240 (1994). MCL 423.242 provides that orders of the Act 312 arbitration panel are subject to judicial review in the circuit court for reasons that the arbitration panel "was without or exceeded its jurisdiction" or if the order is not supported by "competent, material and substantial evidence on the whole record" or if the order was procured by unlawful means. Thus, "where the panel acted within its jurisdiction and the order is supported by competent, material, and substantial evidence and not procured through fraud, collusion, or other unlawful means, the circuit court and [this] Court must enforce the award." *Id.* at 551. This Court "may not reassess the wisdom of the arbitration panel or engage in a review de novo." *Id*. Substantial evidence is defined as more than a scintilla but substantially less than a preponderance of the evidence. *Trenton v Trenton Fire Fighters Union, Local 2701*, 166 Mich App 285, 292; 420 NW2d 188 (1988).

III. Analysis

The Public Employment Relations Act (PERA), MCL 423.201, *et seq*., governs labor relations in public employment. It imposes a duty of collective bargaining on public employers and unions only with respect to those matters which constitute "mandatory subjects of bargaining." *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one which has a material or significant impact upon "wages, hours and other terms and conditions of employment." MCL 423.215(1); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177; 445 NW2d 98 (1989). Issues falling outside mandatory subjects of bargaining are classified as either permissive or illegal. *Id*. at 178. With respect to jurisdictional challenges to Act 312 arbitration proceedings, the arbitration panel may only decide those issues that are mandatory subjects and, absent an agreement of the parties, may not decide proposals that are merely permissive. *Metropolitan Council No. 23, AFSCME Local 1277 v Center Line*, 414 Mich 642, 653-654; 327 NW2d 822 (1982); *Local 344, supra* at 551, *citing Manistee v Manistee Fire Fighters Ass'n*, 174 Mich App

118, 122; 435 NW2d 778 (1989). What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n, supra* at 178. Because public employees are restricted from striking, the courts generally construe the scope of a public employer's bargaining obligation broadly. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277-278; 273 NW2d 21 (1978).

The city contends that the Act 312 arbitration panel lacked jurisdiction to compel the inclusion in the collective bargaining agreement of a clause that removed from the public employer the power to establish policy over fire fighter personal safety equipment and safe working conditions, and placed the power in a joint public employer-union committee.

In this case, the union submitted to arbitration disputes over such matters as (1) untested personal air bottles, (2) broken air refilling stations and compressors, (3) fire engine and station exhaust systems, (4) follow-up medical examinations for fire fighters who were exposed to hazardous chemicals at a fire in a chemical company, and (5) pillowcases and sheets for the beds at the fire stations. It is important to note that both the city and the union agree that these issues, relating to personal fire fighter safety equipment and safe working conditions, were mandatory subjects of bargaining over which the panel had jurisdiction to resolve.

The union also presented extensive evidence into the long history of disputes over other items of personal safety equipment and safe working conditions that the city failed to provide in violation of previous collective agreements and court orders entered to enforce the terms of previous agreements. There was ample evidence to establish the failure of the city to provide for the basic safety needs of its fire fighters that resulted in violations of state safety laws and regulations. In an effort to resolve the longstanding disputes, the union submitted a proposal that would grant the JHSC binding powers to address the disputes. The panel agreed, stating that the city's continuing and serious failure to provide safe living quarters and essential protective equipment justified acceptance of the union's proposal. The panel stated that it adopted the union's proposal as "a mechanism for more rapidly implementing changes that are essential to firefighters' health and safety."

It appears that the panel resolved the mandatory bargaining subjects over which it had jurisdiction by delegating to the JHSC the binding authority to use its expertise to reach consensus over the disputes. The panel provided no authority to support its decision and the union conceded at oral arguments on appeal that none exists. We conclude that the panel lacked jurisdiction to award the clause for three reasons.

First, the clause that the panel awarded constitutes an improper infringement upon the city's prerogative to establish the fire department's safety policy. The parties do not dispute that it is within the scope of the city's managerial prerogative to set safety policy.[3] Managerial decisions regarding the size and scope of municipal services are within the scope of the managerial prerogative. *Centerline, supra* at 660. As our Supreme Court explained, "certain

[3] While the union agrees that establishing policy is clearly within the public employer's prerogative, the union contends that the clause at issue does not infringe on that prerogative.

subjects are within the scope of management prerogative, and the public employer, who remains politically accountable for such decisions, must not be severely restricted in its ability to function effectively." *Bay City Education Ass'n v Bay City Pub Schools*, 430 Mich 370, 376; 422 NW2d 504 (1988). Accordingly, policy decisions "must be left to the politically accountable representatives." *Centerline, supra* at 665. Case law clearly establishes that decisions based on factors "such as need, available revenues, or public interest" are within the scope of the managerial prerogative. *Id*. at 660. It is also well established that policies related to work conditions are within the prerogative of the city. *Id.* While the initial decision "must be left to the politically accountable representatives," there can still be mandatory bargaining over the *impact* of such a decision.[4] *Center Line, supra* at 665.

The clause granted the JHSC, by a majority vote, the power to establish the city's policies on (1) "[c]hanges to, additions to, purchase (and specifications) and testing" of fire fighters' personal protective apparel and equipment and equipment related to safe work conditions at the fire house, (2) the correction of "unsafe or harmful working conditions, including the setting of a deadline for the abatement of such conditions, as they relate to fire fighters' personal protective equipment and the maintenance of safe living quarters," and (3) the "cleaning and testing of air compressors." Although unclear with respect to whether a majority vote is required, the clause also granted the JHSC the power to, among other things, enforce the repair of fire department facilities and equipment relative to hazardous conditions or unsafe work methods.

The panel determined that the empowered JHSC would not infringe on the city's managerial prerogative to establish safety policy because any decision by the JHSC would require a majority vote from four of the six committee members. If the three union members voted in favor of a decision, the vote of at least one city member would be required to secure a majority vote. As the panel reasoned, the city maintained the power to direct its members' votes. We disagree. The language of the clause broadly grants the committee policy-decision power that binds the city. No authority exists to show that the panel had the jurisdiction to remove policy decisions from the public employer and place it in the hands of three union and three public employees. We agree with the city's assertion that the language of the clause is overbroad, and infringes on the city's prerogative to establish policy. It makes all of the JHSC decisions binding and will only serve to create further disputes and litigation over the extent and reach of the JHSC's authority.

Second, the clause removed from the Act 312 arbitration the entire procedures which a panel must follow in determining awards for mandatory subjects of bargaining. Act 312 arbitrators are required to base their findings, opinion and orders on factors specified in MCL 423.239. An Act 312 panel must act within its jurisdiction and its order must be supported by

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[4] As previously stated in this opinion, the parties do not dispute that the *impact* of the city's policy-decisions, that is, the specific items such as (1) untested personal air bottles, (2) broken air refilling stations and compressors, (3) fire engine and station exhaust systems, (4) follow-up medical examinations for fire fighters who were exposed to hazardous chemicals at a fire in a chemical company, and (5) pillowcases and sheets for the beds at the fire stations, are mandatory subjects of bargaining over which the panel had jurisdiction.

"competent, material, and substantial evidence and not procured through fraud, collusion, or other unlawful means." *Local 344, supra* at 551. The clause that the panel endorsed removed the mandatory subjects of bargaining from the confines of the above procedures and placed them without restriction, accountability or even judicial review or redress, into the hands of non-Act 312 arbitrators.

The language of the clause also grants the JHSC the authority to determine any dispute that may arise during the lifetime of the collective bargaining agreement. Because such disputes have yet to arise in the future, they were not presently before this panel. The parties present no authority that would grant a panel jurisdiction to determine the fate of nonexistent disputes or future disputes that cannot be predicted. Further, as demonstrated in the arbitration award, the union raised disputes related to broken fire hydrants, unsafe ladder trucks, the union's request to placard the sites of hazardous chemicals, and the purchase of safety equipment to protect fire fighters from hazardous materials. These disputes directly relate to fire fighter safety. However, the panel determined they were not mandatory subjects of bargaining over which it had jurisdiction.[5] It logically follows that it would be impossible to predict the safety disputes that may arise during the life of the collective agreement that are not mandatory subjects of bargaining over which a future Act 312 arbitration panel would lack jurisdiction to resolve. We conclude that the instant panel lacked jurisdiction to grant the JHSC the power to resolve presently nonexisting disputes that may or may not become mandatory subjects of bargaining.

Third, the clause infringes on the parties' legal duty to bargain and the union's right to seek legal redress in the court system over the enforcement of awards related to mandatory subjects of bargaining. While not raised by the parties on appeal, we cannot overlook an issue that the circuit court raised below. At the hearing before the court, the union's attorney expressly stated that it submitted the proposal to modify the clause to remove safety disputes from the bargaining process so as to avoid subjecting safety issues to compromises and concessions during negotiations with the city. The union's attorney also expressly agreed with the court's reasoning that the clause removed the issue of fire fighter safety from collective bargaining and placed it in the control of the JHSC. The court stated that the empowered JHSC would act as a mini-collective bargaining tool, not unlike the process involved in collective bargaining. A review of the language of the arbitration award does suggest that the panel may have granted the award partially on the ground that it believed it more appropriate to remove safety issues from collective bargaining. Further, on appeal, the union's attorney conceded that the safety equipment and working condition issues before an empowered JHSC would remove these items from legal redress and enforcement.

The PERA imposes a duty of collective bargaining on public employers, unions, and their agents, MCL 423.210; *St Clair Intermediate School Dist v Intermediate Educ Ass'n*, 458 Mich 540, 550; 581 NW2d 707 (1998). "By statute, the employer and the representative of the

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[5] The parties do not challenge the panel's determination that it had no jurisdiction over broken fire hydrants, unsafe ladder trucks, the union's request to placard the sites of hazardous chemicals, and the purchase of safety equipment to protect fire fighters from hazardous materials.

employees are required to bargain for wages, hours, and other terms and conditions of employment, MCL 423.215 . . . which constitute mandatory subjects of collective bargaining." *Id*. at 550-551. Our Supreme Court explained that "there is a difference between whether a subject is covered by a collective bargaining agreement and whether the right to bargain about a mandatory subject has been waived," as follows:

> A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.
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> * * *
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> When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules--a new code of conduct for themselves--on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of the Authority, the National Labor Relations Board or the courts to interfere with the parties' choice. . . . On the other hand, when a union waives its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require "clear and unmistakable" evidence of waiver and have tended to construe waivers narrowly. [*St Clair Intermediate School Dist, supra* at 570-571 (quotations omitted).]

In this case, there is nothing to indicate that the union waived its right to bargain with the city the mandatory bargaining subjects of fire fighter personal equipment and apparel, safe work conditions, and safety training. There is nothing to suggest, other than the comments stated on the record by the union attorney, that the union knowingly and voluntarily relinquished its right to bargain these mandatory subjects of bargaining.

We sympathize with the union over what the panel determined was decades of frustration which Detroit fire fighters had to endure due to the city's "continuing and serious deficiencies" in failing to provide for their basic safety needs, and we do not condone the city for its consistent violations of previous collective agreements and court orders. However, we conclude that the Act 312 arbitration panel lacked the authority to enforce the clause into the collective bargaining agreement. We reverse the circuit court's order denying the city's motion for vacatur and granting the union's counterclaim. We remand to the Act 312 panel so that it may decide the specific, individual mandatory subjects of bargaining that were properly presented to it at arbitration. In doing so, the panel must act within its jurisdiction and its order must be supported by "competent, material, and substantial evidence and not procured through fraud, collusion, or other unlawful means," *Local 344, supra* at 551. It must base its findings, opinion and orders on

factors specified in MCL 423.239. In light of our decision, we do not address the city's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Christopher M. Murray