STATE OF MICHIGAN

COURT OF APPEALS

OAKLAND COUNTY and OAKLAND COUNTY SHERIFF'S DEPARTMENT, Respondents-Appellees, v OAKLAND COUNTY DEPUTY SHERIFF'S ASSOCIATION, Charging Party-Appellant.	FOR PUBLICATION February 3, 2009 No. 280075 MERC LC No. 06-000031 Advance Sheets Version

Before: Jansen, P.J., and O'Connell and Owens, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. The central issue in this case requires this Court to decide whether Oakland County corrections officers, as well as others employed by the Oakland County Sheriff's Department, are entitled to an evidentiary hearing to determine whether they are eligible for arbitration pursuant to what is commonly known as Act 312, the act providing for compulsory arbitration of labor disputes in police and fire departments, MCL 423.231 *et seq*. In my view, the Michigan Employment Relations Commission (MERC) improperly denied the Oakland County Deputy Sheriff's Association (the union) its opportunity to have an evidentiary hearing on this important issue, particularly with regard to the status of the corrections officers. I would vacate the MERC's decision and remand this case to the administrative hearing officer for an evidentiary hearing.[1]

[1] Initially, I wish to emphasize that this case concerns whether a work stoppage by corrections officers would threaten community safety. To my knowledge, neither the MERC nor any court has addressed the issue in its proper framework. I would instruct the hearing officer to determine, on the basis of the totality of the circumstances, whether a work stoppage by the corrections officers represented by the union would threaten public safety. At the hearing, the hearing officer need not and should not focus on the issue of replaceability. Instead, the hearing officer should address the central issue of this case, namely, whether a work stoppage by corrections officers threatens community safety. In my opinion, whether ameliorative actions by the employer can be taken to reduce the threat is irrelevant.

Public employees are prohibited by statute from striking. MCL 423.202. However, in passing Act 312, the Legislature provided that "public police and fire departments" could enter into compulsory, binding arbitration to settle labor disputes.[2] *Capitol City Lodge No 141, Fraternal Order of Police v Ingham Co Bd of Comm'rs*, 155 Mich App 116, 117-118; 399 NW2d 463 (1986). "Public police and fire departments" that are eligible for Act 312 arbitration include "any department of a city, county, village, or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof . . . ." MCL 423.232(1). Act 312 "reflects the Legislature's concern that employees of public police and fire departments, who provide vital services to their communities and who are prohibited by law from striking, have a binding procedure for resolving labor disputes which is more expeditious, more effective and less expensive than courts." *Capitol City Lodge*, 155 Mich App at 118.

In *Metro Council No 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 335; 294 NW2d 578 (1980), a plurality of our Supreme Court set forth two conditions that a union must establish before it is eligible for Act 312 arbitration:

> First, the particular complainant employee must be subject to the hazards of police work . . . . Second, the interested department/employer must be a critical-service county department engaging such complainant employees and having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety . . . .

Although *Metro Council No 23* provided direction, MERC panels still weighed the duties and responsibilities of corrections officers represented by different bargaining units to determine whether the circumstances of their employment indicated that they were entitled to Act 312 arbitration. And, in particular, MERC rulings issued before 1986 indicated that corrections officers employed by a county sheriff's department were eligible for Act 312 arbitration.

The MERC panel in *Washtenaw Co Sheriff's Dep't v Teamsters Local 214*, 1979 MERC Lab Op 671, 677, had determined before *Metro Council No 23* was issued that corrections officers who performed standard security duties, as well as corrections officers working as cooks and nurses in the jail, "performe[d] a security-type function" and were exposed to the hazards of police work; therefore, they were eligible for Act 312 arbitration. The MERC panel in *Bay Co v*

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[2] In MCL 423.231, the Legislature identified its reasons for providing compulsory arbitration of labor disputes in police and fire departments:

> It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

Bay Co Sheriff's Deputies Ass'n, 1985 MERC Lab Op 377, applied the two-part test presented in *Metro Council No 23* to determine that corrections officers employed by the Bay County Sheriff's Department were eligible for Act 312 arbitration. First, the panel determined that the correctional facility officers (CFOs) working at the Bay County jail were exposed "to risks substantially similar to those of sworn police officers so that the CFOs should be deemed to be subject to the hazards of police work." *Id.* at 383. The panel then addressed the second part of the *Metro Council No 23* test, explaining that the

> second part of the test . . . pertains not to the employee himself, but to his employer. That is, according to the Supreme Court, the employee must not only be an employee "subject to the hazards of police work," but also must be employed by a "critical service police department (or fire department) having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety." . . . [T]here is no question that the Bay County Sheriff's Department, the department/employer of the CFOs in this case, meets the definition of a "critical service police department."
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> As our cases subsequent to that decision have indicated, [*Metro Council No 23*] holds that both the employee and the employing department must have "critical service status" in order to effectuate Act 312's intent as (1) requisite to the high morale of (the department); (2) requisite to the efficient operation of (the department); or (3) necessary for averting critical service strikes which would likely impede the public safety, order and welfare. In this regard, we believe that it is clear from this record that the functions performed by the CFOs at the Bay County jail are essential to the public safety, order and welfare of the County. Moreover, regardless of what arrangements might be made for employee replacement or transfer of prisoners in the event of a strike, a strike or unresolved labor dispute involving these employees would, we believe, clearly undermine the morale and efficient operation of the Bay County Sheriff's Department. Thus we conclude that the inclusion of the CFOs in this case within the scope of Act 312 would be in accord with the intent of and would further the purposes of the Act.
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> In making Act 312 applicable not only to police officers and firefighters, but also employees of police departments "subject to the hazards" of police officers, the legislature clearly did not intend to limit the coverage of this Act only to sworn and certified police officers and firefighters. As the CFOs in this case are critical service employees subject to the hazards of police work and employed by a police department within the meaning of that statute, we find they are covered by the provisions. [*Id.* at 383-384.]

The *Bay Co* panel properly applied the requirements that the *Metro Council No 23* Court placed on it to determine if an employee's "critical service status" would cause a threat to community safety if that employee went on strike, taking a holistic view of the effect of a strike on community safety rather than making this determination on the basis of one factor.

However, in *Capitol City Lodge*, 155 Mich App at 119, this Court challenged the MERC's understanding that corrections officers could be eligible for Act 312 arbitration, holding instead that even if corrections officers at the Ingham County jail were subject to the hazards of police work, insufficient evidence supported a finding that a work stoppage at the jail would threaten community safety. Notably, though, the *Capitol City Lodge* Court did not simply claim that the MERC panel in that case had made an evidentiary holding regarding whether a threat to community safety occurred. Instead, the Court recognized that "the commission did not discuss whether a strike by jail security officers would threaten community safety." *Id.* at 120. Yet, rather than remand the case to the MERC for an evidentiary hearing to determine if a strike by the corrections officers would pose a threat to community safety, the *Capitol City Lodge* Court made an independent factual decision, without the benefit of a complete lower court record, that such a strike would not threaten community safety. *Id.* at 120-121. In particular, the Court noted that the sheriff and the undersheriff of Ingham County had testified that they had a plan[3] to staff the jail in the event of a strike by the jail security officers and opined that, under these circumstances, such a strike would pose no threat to community safety. *Id.* at 120. Relying on these statements and other information in the record, the *Capitol City Lodge* Court determined that in the event of a strike, the sheriff could take law enforcement officers and command officers from road patrol and other assignments to assume the duties of the striking jail security officers and could transfer inmates to other jails. *Id.* at 120-121. In addition, the Court noted, the sheriff would be able to hire "adequate replacements for striking jail security officers, who are not required to be certified, . . . within three to five days." *Id.* at 120. Finally, after noting that the union did not present any contrary evidence and determining that the security guards could be replaced, the *Capitol City Lodge* Court concluded that a strike by the jail security guards would not threaten community safety. *Id.* at 121.

Although the *Capitol City Lodge* Court should not have even made these factual determinations, it was still a fact-based decision. It was not intended to be a blatant statement of the law, and it should not be treated as such. The *Capitol City Lodge* Court reached its conclusion without the benefit of either contrary evidence or any findings of fact and conclusions of law by a lower tribunal on this important topic. And, at most, *Capitol City Lodge* merely stands for the proposition that in that case, in light of the lack of specific facts presented to that MERC panel (and then to the *Capitol City Lodge* Court), the union failed to establish that a strike by its members would threaten community safety. The opinion does not stand, and never has stood, for the proposition that if an employee can be replaced, then no threat to community safety exists.[4] Instead, the second element of the *Metro Council No 23* test remains intact: members of

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[3] I note that the fact that the sheriff has a plan, whether written or unwritten, to replace striking corrections officers does not in and of itself answer the question whether such a strike would threaten community safety. A deeper examination of the plan is necessary. I am reminded of the old saying: The best-laid plans of mice and men often go awry. It would be better, therefore, to ask whether community safety is threatened if corrections officers go on strike. When the question is asked in its proper framework, the answer appears to be self-evident.

[4] Such a conclusion would be equivalent to saying that if a police officer can be replaced, then a strike by the police would not be a threat to the safety of a community. Anyone can be replaced.
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a bargaining unit are only entitled to Act 312 arbitration if they are employees of a critical-service department promoting public safety, order, and welfare, so that a work stoppage by those employees would threaten community safety. The *Capitol City Lodge* Court merely considered whether the corrections officers at the Ingham County jail were replaceable to determine whether this second element was established.[5]

Regardless, subsequent MERC panels treated the *Capitol City Lodge* opinion as a legal determination, holding that the opinion bound them to find that no threat to community safety existed as long as the striking corrections officers could be replaced.[6] See *Kent Co v Kent Co Deputy Sheriff's Ass'n*, 1991 MERC Lab Op 549, 554 ("As interpreted by the Court of Appeals [in *Capitol City Lodge*], the second part of the test turns on whether or not striking employees could be replaced."). In *Washtenaw Co v Police Officers Ass'n of Michigan*, 1990 MERC Lab Op 768, 770, the county presented evidence indicating that the corrections officers could be replaced in the event of a strike.[7] Relying on *Capitol City Lodge* and another panel's decision in

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Replacing a police officer with an unqualified individual, in my opinion, would pose a threat to the community.

[5] Unfortunately, in *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580; 599 NW2d 504 (1999) (*POAM*), this Court compounded the errors in *Capitol City Lodge* by adopting the *Capitol City Lodge* Court's line of reasoning. Regardless, the *POAM* Court addressed this issue in the context of responding to different appellate arguments than those raised in this case, namely, whether the commission "erred in failing to consider the jail inmates as 'members of the community' for purposes of deciding whether a 'threat to community safety' existed in determining the eligibility of the corrections officers for Act 312 arbitration" and whether the commission's "decision was defective for failing to consider the safety of the inmates as part of the public-safety analysis." *Id.* at 593, 595.

[6] In two MERC opinions issued soon after *Capitol City Lodge*, the MERC panels noted that the rationale in *Capitol City Lodge* regarding whether a strike by corrections officers constituted a threat to community safety diverged from the MERC panel's finding with regard to this issue in *Bay Co*. *Detroit v Michigan Fraternal Order of Police*, 1986 MERC Lab Op 966; *Detroit Police Dep't v Michigan Fraternal Order of Police*, 1986 MERC Lab Op 972. However, the MERC panels also noted that the parties did not contend that in the event of a strike, corrections officers could be adequately replaced without a threat to community safety and that the records in these cases provided no evidence to support a finding that the city could transfer adequate manpower from other public safety duties to man the jail or could swiftly hire adequate replacements. *Detroit*, 1986 MERC Lab Op at 969; *Detroit Police Dep't*, 1986 MERC Lab Op at 975. In both cases, the MERC panel concluded that "[i]n the absence of such evidence," the "fact that [corrections officers] are employed by a police department and perform a function essential to public safety is sufficient to establish their 'critical service' status." *Detroit Police Dep't*, 1986 MERC Lab Op at 975; see also *Detroit*, 1986 MERC Lab Op at 969.

[7] The MERC panel noted that the

> Undersheriff, when questioned about what would happen if the [corrections officers] engaged in a work stoppage as part of a bargaining procedure, stated that the first effort of the County would be to reduce the number of inmates in the facility. This would be done by transporting prisoners to other facilities and getting court permission to release misdemeanor prisoners. The second effort on

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Mecosta Co v Police Officers Ass'n of Michigan, 1989 MERC Lab Op 607, the Washtenaw Co MERC panel concluded that the record did not "contain sufficient competent, material, or substantial evidence that a strike by the Washtenaw County correction officers would pose a threat to community safety" and determined that the corrections officers were not eligible for Act 312 arbitration. *Washtenaw Co,* 1990 MERC Lab Op at 772. In particular, the panel noted that the precedent established by those cases led to a finding that community safety would not be threatened as long as some set of circumstances existed under which the striking corrections officers could be replaced. *Id.* at 771. The panel stated:

> In the [*Capitol City Lodge*] case, as here, the union argued that using road patrol deputies and other deputies would threaten the safety of the county residents by diminishing available personnel in other areas of law enforcement. The [*Capitol City Lodge*] Court specifically stated in this regard, "We agree with this Court's rejection of a similar argument in *Lincoln Park Detention Officers* v *City of Lincoln Park*, [76] Mich App 358, 256 NW2d 593 (1977).["] The [*Capitol City Lodge*] Court emphasized that reserves, as well as command officers and deputies, could take the place of striking [corrections officers]. The head of the Union in the instant case indicated he would recommend that the deputies not work in the jail and, therefore, the public and the prisoners would be endangered by a strike. This argument was considered in [*Mecosta Co*, 1989 MERC Lab Op at 612]. As in *Mecosta*, no evidence in this case indicates that deputies would disobey orders to fill in for striking [corrections officers]. In the *Mecosta* case, we stated as follows:
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> "In the case at hand, however, apparently in an effort to distinguish the [*Capitol City Lodge*] case, we have testimony of the president of the union that if the security officers struck, the road deputies would "honor" the strike, thus, the deputies would also engage in a strike, contrary to [the public employment

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> the part of the County would be to staff the jail, which he claims could be done by calling in the road patrol deputies. In this regard, the president of the [union] testified that he would advise the deputies not to do the [corrections officers'] work should the [corrections officers] be on strike. The record does not disclose whether or not the sworn deputies or road patrol deputies would disobey an order to man the jail. Another effort to man the jail would be to call in the 20 command officers. The undersheriff estimates there would be about 42 officers in a core group able to staff the jail.
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> The largest percentage of the County jail inmates, about 38 to 42 percent, are those convicted of misdemeanors whose offenses allow the Department to release them when the jail has become too crowded. The record also discloses that felony prisoners may be locked down in the maximum security block. This block could be supervised by experienced deputies called in from the road patrol. [*Washtenaw Co*, 1990 MERC Lab Op at 770.]

> relations act]. This, however, does not take the case beyond the consideration of the [*Capitol City Lodge*] case. The testimony of the sheriff was that he was available and the undersheriff was available, as well as the officer in charge of the jail, and a nonunion captain of the sheriff's department. This alone would take care of more than the three shifts requiring one man. If more than one person was necessary, the record establishes that the four part-time security officers would be available as nonunion personnel. The record contains no evidence that would justify the conclusion they would strike in support of the security officers." [*Id.*, quoting *Mecosta Co*, 1989 MERC Lab Op at 612.]

Similarly, in *Kent Co*, another MERC panel determined that although no formal plans were in place to replace corrections officers in the event of a strike, testimony by the sheriff and the undersheriff regarding emergency matters that would be implemented if a strike occurred was sufficient to establish that the corrections officers could be replaced and, therefore, no threat to community safety would occur. *Kent Co*, 1991 MERC Lab Op at 554-555; see also *Macomb Co Sheriff's Dep't v Michigan Fraternal Order of Police*, 1991 MERC Lab Op 558 (finding that because corrections officer supervisors could be replaced in the event of a strike, a threat to community safety would not occur if they went on strike and, therefore, they were not entitled to Act 312 arbitration).

In his concurring opinion in *Kent Co*, panel member David S. Tanzman explained the changes that *Capitol City Lodge* triggered concerning the manner in which MERC panels determined whether a strike by corrections officers would pose a threat to community safety, as well as the policy changes that opinion implemented:

> I concur with my colleagues' conclusion that the corrections officers and radio technician in this case are not eligible to have their dispute with their employer arbitrated under 1969 PA 312, but only because I believe *Capitol City Lodge* compels this conclusion.
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> Under the [*Capitol City Lodge*] Court's interpretation of [*Metro Council No 23*], an employee who is not a certified police officer or firefighter must meet three tests before he can be found 312-eligible. First, his job must be subject to the hazards of police or firefighting work. We have repeatedly held that correction officers or jail guards are subject to the hazards of police work, and no court has disagreed with us on this point. *See, e.g. Washtenaw County Sheriff's Department*, 1979 MERC Lab Op 671; *County of Bay*, 1985 MERC Lab Op 377; *Local 214, Teamsters* v *City of Detroit*, 91 Mich App 273 [283 NW2d 722] (1979) [vacated 410 Mich 876 (1980)]. Secondly, the employee must be employed in a critical service department having as its principal function the promotion of the public safety, order, and welfare so that a work stoppage in that department would threaten community safety. The Kent County Sheriff Department is such a department. Moreover, were the Kent County jails to cease to function as a result of a work stoppage, a serious threat to community safety would arise. However, under [*Capitol City Lodge*], an employee must also meet a third test. That is, he must be an employee who could not be adequately replaced in the event of his striking.

> I disagree with the [*Capitol City Lodge*] Court that an employee who performs a function critical to public safety is not covered by Act 312 if his employer asserts that his function could be performed by some other persons on a temporary basis in the event of a strike. I do not read this in [the *Metro Council No 23* Court's] holding that the prosecutor's investigators in that case were not covered by Act 312 because their department was not a critical service department in which a work stoppage could threaten community safety. I also note that many sworn police officers, a group clearly intended to be covered by Act 312, might not qualify under the [*Capitol City Lodge*] test because in the event of a strike their law enforcement functions might be assumed by the State Police or by neighboring police departments.
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> In addition, I also disagree with the [*Capitol City Lodge*] Court's analysis of whether the corrections officers in that case could be replaced in the event of a strike without a threat to community safety. In [*Capitol City Lodge*], the Employer described certain measures it would take to replace striking corrections officers. These measures included assigning road patrol deputies to the jail, hiring replacements, and transferring prisoners to other jails. The Court in [*Capitol City Lodge*] rejected the union's argument that moving road patrol deputies from their usual duties to man the jail would result in a threat to community safety, citing the pre-[*Metro Council No 23*] decision in *Lincoln Park Detention Officers.* That decision noted that a [*sic*] work stoppages by almost any category of public employee, including street and highway personnel, could theoretically cause an extra burden on the police department. However, the [*Capitol City Lodge*] Court failed to note that in its case the number of correction officers exceeded the number of deputies with whom the Employer intended to replace them. Therefore, adequately manning the jail with deputies would require the Employer to essentially cease its law enforcement activities. The Court in [*Capitol City Lodge*] also failed to note that since the corrections officers and deputies were in the same bargaining unit, both groups would likely be on strike at the same time. Thirdly, the [*Capitol City Lodge*] Court did not question the Employer's assertion that it could operate its jail with untrained replacements without creating a risk to the public.
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> In the instant case, the sheriff and undersheriff testified that in the event of a strike by corrections officers they would utilize road patrol deputies and supervisory employees, hire replacements, extend shifts, transfer prisoners, and request assistance from the State Police to take over the law enforcement functions of its transferred deputies. I agree with my colleagues that there are no significant differences between the facts in [*Capitol City Lodge*] and those of the instant case. Therefore I reluctantly agree with their conclusion that the employees in this case are not eligible for arbitration under Act 312. [*Kent Co*, 1991 MERC Lab Op at 555-557 (citation omitted).]

In my opinion, the MERC has misinterpreted the extent of this Court's holding in *Capitol City Lodge*. The *Capitol City Lodge* Court acknowledged that the commission had not discussed whether a strike by jail security officers would threaten community safety, and it noted that the

"record does not contain competent, material and substantial evidence that a strike by the Ingham County jail security officers would pose a threat to community safety." *Capitol City Lodge*, 155 Mich App at 121. However, *Capitol City Lodge* does not stand for the proposition that employees are not eligible for Act 312 arbitration if they can be adequately replaced in the event of a strike.

In addition, *Capitol City Lodge* does not support the conclusion that corrections officers must meet the three-part test developed by MERC panels to be eligible for Act 312 arbitration. The MERC concluded that *Capitol City Lodge* compelled a determination that the employees in question must not be adequately replaceable in the event of a strike in order to establish that a strike by these employees would threaten community safety. See *Washtenaw Co*, 1990 MERC Lab Op at 771. However, this is only one factor that should be considered when determining whether a strike by corrections officers would threaten community safety. Rather, the MERC should employ a totality-of-the-circumstances test[8] and consider, among other things, the following additional factors: (1) the size and safety of the inmate population, (2) whether the transfer of inmates to another facility is feasible, (3) whether inmates would be released early in the event of a strike, (4) the effect that moving road patrol officers to the jail would have on public safety,[9] (5) the number of corrections officers needed to staff a jail in the event of a strike and whether it exceeds the number of police officers available, (6) whether police officers and corrections officers are on strike at the same time, (7) whether corrections officers could be replaced with untrained personnel, (8) whether untrained replacements would create a risk to the public,[10] and (9) the effect that replacing union employees with unqualified, nonunion members would have on the morale and efficiency of the department. This is by no means an exhaustive list, and both the union and the employer are free to present additional factors at an evidentiary hearing. Nevertheless, this factors-based totality-of-the-circumstances approach is more

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[8] Such a test requires the MERC panel to ask, Under the totality of the circumstances, does a strike by corrections officers threaten community safety?

[9] For example, transferring road patrol officers to act as corrections officers would leave a shortage of road patrol officers to contain threats and respond to emergencies in the community.

[10] For example, in the rush to replace striking officers, one can envision a sheriff not having time to properly vet applicants and inadvertently hiring a relative or friend of a current inmate. An untrained guard or sympathetic friend or relative guarding a dangerous prisoner is a recipe for disaster and could threaten the safety of the community. Even with trained, professional security guards, jail escapes have occurred. The days of the Mayberry Police Department with Barney Fife guarding the jail have long since passed us by. If Deputy Fife were guarding the Oakland County jail, this certainly would pose a "threat" to community safety.

Similarly, we must remember that even experienced corrections officers face a certain amount of danger each day they report for work. Jails contain murderers, rapists, armed robbers, and other dangerous felons; they are not nice places. Corrections work is significantly more dangerous than being a security guard at your local seminary.

sensitive to the highly factual nature of a determination whether a threat to community safety exists.[11]

I would vacate the decision of the MERC and remand this case for an evidentiary hearing. At the hearing, I would direct the MERC to decide, on the basis of the totality of circumstances, whether a strike by the union's members would threaten community safety. I note that "replaceability" of the employees is only one factor in the commission's decision. The main factor is whether a work stoppage would threaten community safety.

/s/ Peter D. O'Connell

[11] I note that the scope of the phrase "pose a threat to community safety" does not mean that an occurrence is imminent. It is sufficient that a danger, risk, hazard, menace, or peril is created as a result of a strike. *Random House Webster's College Dictionary* (1997) defines "threat" in part as "an indication or warning of probable trouble." The fact that the threat can be avoided by other means does not mean that the threat does not exist; potential avoidance of the threat does not change the character of the evil or harm that may ensue.

I note that if "replaceability" were the only factor to be considered, then, hypothetically, even sworn police officers might not qualify for Act 312 arbitration because, in the event of a strike, their law enforcement functions could be assumed by the state police or by neighboring police departments. The phrase "threat to community safety" is broad in scope and does not contemplate an actual occurrence; it is sufficient if a danger, risk, hazard, or menace might occur as a result of a strike. Act 312 was passed so that employers would not be forced to take extraordinary measures in case of a work stoppage.