STATE OF MICHIGAN

COURT OF APPEALS

AFSCME LOCAL 25, AFSCME LOCAL 101, AFSCME LOCAL 409, and AFSCME LOCAL 1659,

Plaintiffs/Counter-Defendants,

and

MICHIGAN AFSCME COUNCIL 25,

Intervening Plaintiff/Counter-Defendant-Appellee,

v

WAYNE COUNTY,

Defendant/Counter-Plaintiff-Appellant,

and

WAYNE COUNTY CHIEF EXECUTIVE OFFICER,

Defendant-Appellant.

FOR PUBLICATION
August 2, 2012

No. 306414
Wayne Circuit Court
LC No. 10-012269-CZ

Advance Sheets Version

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Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

M. J. KELLY, P.J. (*dissenting*).

After examining the relevant provisions of the public employment relations act, MCL 423.201 *et seq.*, I conclude that the act cannot be read to include a codification of the negotiating tactic referred to as the last-best-offer rule. It also cannot be read to limit a local government's authority to regulate its negotiator's use of the last-best-offer tactic. Instead, whether and to what extent a negotiator may employ the last-best-offer tactic is—unless used in bad faith—a matter of local concern that may be governed by local law. Under local law, defendant Wayne County's Chief Executive Officer (the Executive) had the authority to negotiate collective-bargaining agreements with plaintiffs—four locals and Council 25 of the American Federation of State, County and Municipal Employees (collectively the Unions)—which necessarily included the authority to use the last-best-offer tactic. But local law also limits that authority: the Executive may not use the tactic if it would result in lower benefits for the employees without first obtaining approval from defendant Wayne County—specifically the Wayne County Commission (the Commission). Because the Executive did not obtain the Commission's approval before using the last-best-offer tactic to reduce the employees' benefits, the trial court correctly determined that those terms were unlawful and invalid. Further, I reject defendants' contention that they cannot be compelled to restore the unlawfully withheld pay and benefits because they have governmental immunity. Because I would affirm the trial court on these bases, I must respectfully dissent.

I. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition as well as the proper interpretation and application of statutes. *Chen v Wayne State Univ*, 284 Mich App 172, 191, 200; 771 NW2d 820 (2009).

B. OBLIGATION TO BARGAIN IN GOOD FAITH

The majority argues that the use of the last-best-offer tactic is integral to the bargaining process and "inherent to the statutory obligation to negotiate in good faith . . . ." *Ante* at 4. The majority asserts that, because "the authority to implement the [last best offer] was integral to the negotiation process, . . . commission approval was not required before the [offer] could be implemented." *Ante* at 4-5. Although its analysis is not entirely clear, the majority has apparently interpreted the statutory duty to bargain in good faith as an inherent limitation on the authority of local governments to regulate their own conduct during negotiations. To the extent that the majority's opinion can be read to stand for that proposition, it has no basis in the statutory language and, therefore, amounts to a judicially created rule that usurps the power of local governments to regulate their own conduct.

The public employment relations act provides, in relevant part, that a "public employer shall bargain collectively with the representatives of its employees . . . ." MCL 423.215(1). Further, the duty to bargain collectively is a "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." *Id.* However, the obligation to bargain in good faith "does not compel either party to agree to a proposal or make a concession." *Id.* Notably, this statute does not delineate the types of tactics that may be used during negotiations—it merely mandates that the bargaining be in good faith, whatever the tactics. See *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54; 214 NW2d 803 (1974) (stating that the essential requirement of good-faith bargaining is simply that the parties manifest an attitude and conduct that are conducive to reaching an agreement). Similarly, the statute imposes the obligation to bargain in good faith on the "public employer," but does not propose to identify or limit the authority of local governments to select individuals or entities to bargain on their behalf and does not require local governments to give unfettered authority to their representatives to use whatever tactics the representative might wish to use, as long as those tactics are consistent with good-faith bargaining. The statute is quite limited in application and accordingly cannot be understood to deprive local governments of the ability to specify whether, when, or how specific bargaining tactics may be used. See *Local 1277, Metro Council No 23, AFSCME v City of Center Line*, 414 Mich 642, 651; 327 NW2d 822 (1982) (stating that the statute is procedural in nature and requires the parties to "'confer in good faith with an open mind and a sincere desire to reach an agreement'") (citation omitted).

Our Supreme Court has recognized that after the parties to a good-faith bargain reach an impasse, a public employer may take unilateral action on a disputed issue if that action "is consistent with the terms of its final offer to the union." *Detroit Police Officers Ass'n*, 391 Mich at 56. And it has been held that the use of the last-best-offer tactic after an impasse is a part of the negotiating process. *Brown v Pro Football, Inc*, 518 US 231, 239; 116 S Ct 2116; 135 L Ed 2d 521 (1996). It is, therefore, permissible to use this tactic. See *Detroit Police Officers Ass'n*, 391 Mich at 63. But the Legislature did not *require* the use of this tactic. Stated another way, a public employer does not necessarily breach its duty to negotiate in good faith simply because it uses the last-best-offer tactic. Similarly, a public employer may legitimately conclude that it is not in its own best interest to use this tactic and, in lieu of its use, continue to operate under an expired bargaining agreement without breaching its duty to negotiate in good faith. Consequently, MCL 423.215(1) does not prevent a local government from directly or indirectly

limiting its own negotiator's use of the last-best-offer tactic, and the majority errs to the extent that it concludes otherwise.

C. LOCAL LAW AND THE LAST-BEST-OFFER TACTIC

The majority also argues that Wayne County's local laws do not require the Executive to obtain the Commission's approval before using the last-best-offer tactic, even when the use of that tactic reduces the public employees' wages. I cannot agree.

Wayne County's charter establishes a personnel department with a labor relations division. See Wayne County Charter, §§ 4.321 and 4.323. The charter also provides that the labor relations division has the responsibility to "act for the County under the direction of the [Executive] in the negotiation and administration of collective bargaining contracts." Id. at § 4.323(b). Thus, under the charter, the Executive has the general authority to direct the negotiations conducted by the labor relations division. Nevertheless, the Executive's power to direct the labor relations division is not unlimited; the Executive is empowered to "[s]upervise, coordinate, direct, and control all county facilities, operations, and functions *except as otherwise provided by law or this Charter*[.]" *Id*. at § 4.112(a)(1) (emphasis added). Accordingly, the Executive's authority to direct the labor relations division does not include the authority to direct the labor relations division to violate Wayne County's ordinances or charter. As a result, the relevant question is whether Wayne County's ordinances require the Executive—acting through the labor relations division—to obtain approval before implementing the last-best-offer tactic.

Wayne County's charter provides that the Commission is the county's legislative body, *id*. at § 3.111, and that the Commission must exercise its powers by ordinance or resolution, *id*. at § 3.115. The charter also grants the Commission the power to approve all contracts made by the county. *Id*. at § 3.115(3). And the Commission has expressly reserved that right by ordinance with respect to collective-bargaining agreements. Wayne County Code, § 120-121(c).[1] However, the use of the last-best-offer tactic does not result in the creation of a collective-bargaining agreement because it does not amount to a meeting of the minds. See *Port Huron Ed Ass'n MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 326-327; 550 NW2d 228 (1996) (noting that there must be a meeting of the minds in order to form a contract and stating that a collective-bargaining agreement, like any other contract, is the product of mutual assent); but see *McNealy v Caterpillar, Inc*, 139 F3d 1113, 1121-1122 (CA 7, 1998) (stating that unilateral implementation of the last-best-offer tactic amounts to an offer for an interim agreement, which can be accepted by the workers returning to work during the period of continuing negotiations). Hence, the provisions applicable to completed contracts do not compel the Executive to seek the Commission's approval before using the last-best-offer tactic.

[1] I shall refer to the ordinances using their codification in the Wayne County Code of Ordinances rather than the numbers assigned at their adoption. The chief ordinance at issue in this case, which the majority and the parties refer to as 90-847, was codified at §§ 5-1 through 5-6 of the Wayne County Code (the Code).

Nevertheless, the Unions argued that the Wayne County ordinances governing its agencies' rulemaking authority plainly apply to the Executive's use of the last-best-offer tactic. See Wayne County Code, ch 5. The trial court agreed and determined that § 5-6(1) of the Code applied to the Executive's use of the last-best-offer tactic. For that reason, it concluded that the Executive had to obtain the Commission's approval before its use could become "valid and of effect."

The majority, in contrast, concludes that § 5-6 does not apply to the use of the last-best-offer tactic. Although the majority quotes the relevant ordinances, it offers very little interpretive analysis; rather, it summarily concludes that, given the overall provisions of the ordinances governing administrative procedures, "the ordinance involves agency rulemaking and is wholly inapplicable to collective bargaining and negotiations . . . ." *Ante* at 7. I cannot agree with this unsupported assertion.

Section 5-6 provides that a "memorandum, directive, order or determination which governs the internal management, organization or procedures of an agency, but which also addresses or substantially impacts upon" certain matters "shall not be valid and of effect unless" it complies with the commission approval requirements stated under chapter 5 of the Wayne County Code. One such matter involves any memorandum, order or determination that fixes the "rate of compensation for county officers and employees, including fringe benefits . . . ." Wayne County Code, § 5-6(1). This ordinance represents a clear policy choice by the local legislature: the Wayne County Commission determined that it is in the best interests of the county to maintain the status quo on the pay and benefits for county employees unless the change is directly approved by the Commission.

Section 5-6 is codified under chapter 5 of the Wayne County Code, which deals generally with administrative rulemaking procedures. This chapter governs the procedures with which an agency must comply in order to validly promulgate "rules" or make "rulings." See Wayne County Code, § 5-2. Section 5-5 provides that certain "rules or rulings" are exempt "from the notice, processing and commission approval requirements" stated under chapter 5, but subject to the exceptions stated under "section 5-6." *Id.* That is, § 5-5 establishes an *exception* to the *exemptions* it provides by reference to § 5-6, but it does not necessarily follow that § 5-6 only applies to rules or rulings. It is noteworthy that the Commission did not refer to the term "rule" within § 5-6. Section 5-1 defines "rule" as

> a directive, statement, standard, policy, regulation, proclamation, ruling, determination, order, instruction or interpretation, which is of general effect and future application, which applies, implements or makes more specific those express laws enforced, implemented or administered by an officer or agency, or which prescribes the organization, procedure or practice of that office or agency, including the amendment, suspension or rescission thereof.

In contrast, § 5-6—on its face—applies generally to all "memoranda, directive[s], orders or determinations" that govern the internal management of an agency. The Commission's decision to refer to these specific categories rather than using the defined terms "rule" or "ruling" must be understood to have been deliberate and must be given effect. See *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) ("Every word of a statute should be given

meaning and no word should be treated as surplusage or rendered nugatory if at all possible."). That is, § 5-6 must be understood to apply to all memoranda, directives, orders or determinations without regard to whether those memoranda, directives, orders or determinations are also rules or rulings under § 5-1. Hence, I cannot agree with the majority's conclusion that this ordinance does not apply because it only "'governs the internal management, organization or procedures of an agency . . . ." *Ante* at 7 (emphasis omitted).

Fixing the rate of compensation and benefits for governmental employees implicates the internal management of an agency. Accordingly, the Executive's use of the last-best-offer tactic is a directive or order that governs the internal management of an agency and which—however temporarily—fixes the compensation and benefits for county employees. Consequently, before the Executive could impose the last-best-offer terms on the Unions' employees, it had to obtain the Commission's approval as provided under § 5-6, which it did not do. For that reason, the Executive's decision to unilaterally lower the county's employees' pay and benefits was void.

II. GOVERNMENTAL IMMUNITY

In their motion for reconsideration of the trial court's order granting summary disposition in favor of the Unions, Wayne County and the Executive argued for the first time that the Unions' claims were barred by governmental immunity. They maintained that the Unions could not seek damages for the pay and benefits that might have been unlawfully withheld because the Unions' claims did not sound in contract and the Unions otherwise failed to plead in avoidance of governmental immunity. Wayne County and the Executive failed to raise this issue in a properly supported motion for summary disposition. As a result, they were not—at that point—entitled to any relief. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009) (stating that a moving party must make a properly supported motion for summary disposition before the opposing party has any obligation to even respond and, if not properly made, the trial court should not grant relief). And this Court will generally not fault a trial court for refusing to consider a defense that a party raised for the first time in a motion for reconsideration. *Pierron v Pierron*, 282 Mich App 222, 264; 765 NW2d 345 (2009). Nevertheless, even considering this issue on its merits, I do not agree that governmental immunity applies.

In this case, the Unions sued to invalidate the Executive's unilateral decision to alter the terms of employment for the Unions' members. Although the claims alleged that the Executive's decision was unlawful under an ordinance, the Unions did not premise their request for relief on that ordinance or any tort theory. Rather, the Unions initially asked the trial court to make their members "whole" and in a later complaint asked for any relief that the trial court might conclude was warranted. Because the Executive unlawfully reduced the members' pay and benefits, that reduction was void. Accordingly, the employees were entitled to have the pay and benefits that were unlawfully withheld restored to them—that is, they were entitled to the pay and benefits that they had actually earned for their labors under the interim contractual agreement either until the Commission approved the Executive's change in the benefits and pay or until the parties entered into a new collective-bargaining agreement, whichever came first. Thus, although the Executive's use of the last-best-offer tactic to unlawfully reduce the members' pay and benefits was void under an ordinance, the damages arise from Wayne County's *contractual* obligation to pay its employees under the interim agreement pending a

lawful change in the pay and benefits. Because the damages arise from this contractual obligation, Wayne County is not immune from liability. See *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999).

III. CONCLUSION

The public employment relations act does not limit a local government's authority to regulate its negotiators' use of the last-best-offer tactic. Wayne County has, as a matter of public policy, determined that its public employees should not have their compensation and benefits reduced without the Commission's approval. The trial court respected that policy choice when it determined that the Executive had exceeded the scope of his authority by cutting the public employees' compensation and benefits without first obtaining approval from the Commission. This Court should respect that policy as well. Finally, the trial court did not err when it determined that the Unions' employees were entitled to restitution for the amount of pay and benefits they had earned under the terms of their interim contract that the Executive unlawfully withheld.

I would affirm.

/s/ Michael J. Kelly