

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.

DONOFRIO, J.

Defendants, Wayne County (or the county) and the Wayne County Chief Executive Officer (the CEO), appeal both as of right and by leave granted the trial court's orders granting partial summary disposition in favor of intervening plaintiff, Michigan AFSCME Council 25, on its claim that defendants unlawfully imposed a wage reduction for county employees, and denying defendants' motion for reconsideration regarding the applicability of governmental immunity. Because defendants were not required to obtain approval from the Wayne County Commission before implementing the terms of the "last best offer," we reverse and remand for entry of summary disposition in defendants' favor.

Plaintiffs (four AFSCME local unions) and defendants were parties to a collective-bargaining agreement (CBA). After the CBA expired, the parties unsuccessfully engaged in negotiations to reach a successor agreement. On October 21, 2010, plaintiffs filed this action, alleging that defendants were in violation of the Wayne County charter and had engaged in improper collective-bargaining practices. In a December 1, 2010, letter to plaintiffs, Mark Dukes, director of Wayne County's labor relations division, declared that negotiations had reached an impasse and indicated that the county would be implementing the terms of its "last best offer" (LBO), which required union employees to accept a 20-percent wage decrease and other concessions. The LBO was issued through the labor relations division, under the authority of the CEO, and was not submitted to or approved by the Wayne County Commission. The county filed a counterclaim for a declaratory judgment and injunctive relief. The trial court granted the motion to intervene of Council 25. Like plaintiffs, Council 25 alleged that the CEO violated Wayne County ordinances by imposing the wage decrease without commission approval.

The trial court granted defendants summary disposition of plaintiffs' claims for lack of jurisdiction¹ and, with respect to intervening plaintiff Council 25, the court granted partial summary disposition in its favor regarding the CEO's failure to obtain commission approval for the wage decrease. The trial court's order invalidated the CEO's imposition of the LBO because it fixed the rates of compensation for county employees without the commission's approval. The court stated that the "matter will proceed on the issue of damages." The court specifically "declare[d] that under the Wayne County Charter and ordinances, to be lawful, any mandate that fixes the rate of compensation for county employees . . . must have the approval of the Wayne County Commission."

Defendants moved for reconsideration or, alternatively, for a stay of proceedings pending appeal, arguing for the first time that they were immune from suit pursuant to the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, for violations of a county ordinance. Defendants contended that the trial court therefore erred by granting partial summary disposition in favor of Council 25. The trial court denied defendants' motion and request for a stay. Defendants now appeal in this Court.

"This Court reviews de novo a trial court's grant or denial of a motion for summary disposition." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Summary disposition under subrule (C)(8) is appropriate when a claim "is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

Public employment labor relations are governed by the public employment relations act (PERA), MCL 423.201 *et seq.* The underlying purpose of PERA "is to resolve labor-management strife through collective bargaining." *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28-29; 753 NW2d 579 (2008) (quotation marks and citation omitted). Following the expiration of a CBA, PERA requires that a public employer bargain collectively and in good faith with respect to wages, hours, and other terms and conditions of employment that are "mandatory subjects of bargaining . . ." *Jackson Community College Classified & Technical Ass'n, MESPA v Jackson Community College*, 187 Mich App 708, 711-712; 468 NW2d 61 (1991) (quotation marks and citation omitted). These subjects "survive the expiration of an agreement by operation of law until an impasse in negotiation occurs." *Id.* at 712. Consequently, "[b]efore an impasse in the bargaining process is reached, neither party may take unilateral action with respect to a mandatory subject of bargaining . . ." *Id.*

Section 15 of PERA, MCL 423.215(1), provides:

¹ The trial court determined that jurisdiction was proper in the Michigan Employment Relations Commission. That ruling pertained to plaintiffs only, not to intervening plaintiff Council 25, and it is not at issue in this appeal.

A public employer shall bargain collectively with the representatives of its employees as described in [MCL 423.211] and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the 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, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

In constructing this provision, our Supreme Court has recognized:

The primary obligation placed upon the parties in a collective bargaining setting is to meet and confer in good faith. . . . The law does not mandate that the parties ultimately reach agreement, nor does it dictate the substance of the terms on which the parties must bargain. In essence the requirements of good faith bargaining is [sic] simply that the parties manifest . . . an attitude and conduct that will be conducive to reaching an agreement. [*Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53-54; 214 NW2d 803 (1974).]

If the parties have negotiated in good faith regarding mandatory subjects of bargaining, their statutory duty under PERA has been met. *Id.* at 55.

Intrinsic to the duty to collectively bargain in good faith is the authority to unilaterally implement an LBO when negotiations have reached an impasse. The parties here do not dispute this authority, which is a product of the evolution of the common law as it pertains to collective bargaining.² See *Detroit Police Officers Ass'n*, 391 Mich at 56; *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94, 97; 393 NW2d 889 (1986). Council 25 argues, however, that because the LBO in this case affected wages and benefits, commission approval was required before the terms of the LBO could be implemented. This argument contravenes the notion that the authority to implement an LBO when an impasse is reached *is part of the negotiation process itself*. The United States Supreme Court has recognized that “impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process.” *Brown v Pro Football, Inc*, 518 US 231, 239; 116 S Ct 2116; 135 L Ed 2d 521 (1996). Similarly, the authority to unilaterally implement the terms of an LBO following impasse has been characterized as a “bargaining ‘tactic[]’ . . . utilized in the collective bargaining process.” *Brown v Pro Football, Inc*, 50 F3d 1041, 1054 (DC Cir, 1995), *aff’d* 518 US 231 (1996). Thus, the implementation of an LBO is a continuation of the collective-bargaining process and inherent to the statutory obligation to negotiate in good faith to reach a CBA. Because the authority to implement the

² With the exception of MCL 423.207a(4), which applies to public school employers, there is no statutory authority granting public employers the right to take unilateral action following a collective-bargaining impasse.

LBO was integral to the negotiation process, and § 4.323(b) of the Wayne County Charter required the labor relations division to “act for the County under the direction of the CEO in the negotiation and administration of collective bargaining contracts,” commission approval was not required before the LBO could be implemented.

In support of its argument that commission approval was required, Council 25 relies on, and the trial court found dispositive, Wayne County Ordinance 90-847,³ pertaining to the rulemaking authority of county agencies. “The rules of statutory construction apply to ordinances” *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 244; 704 NW2d 117 (2005). “When interpreting statutory language, the primary goal is to discern and give effect to the legislative intent that may reasonably be inferred from the language of the statute.” *Id.* at 243. When language is unambiguous, courts must apply the provision as written. *Id.* We accord words used in a provision their common and ordinary meanings and “must ‘give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.’” *Id.* at 244, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Ordinance 90-847, § 3(a) provides:

Subject to county commission approval as hereinafter provided, each county agency shall formulate and promulgate rules to prescribe the organization, procedures and methods by which it serves the public or regulates any public or private activity, process, facility, operation or agency. These rules shall also specify where, when and how a person may obtain information from or submit requests to the agency for service, advice and other assistance.

Ordinance 90-847, § 2, defines “rule” as follows:

Rule means 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.

Ordinance 90-847, § 3, sets forth requirements that must be met before an agency adopts a rule, including:

(f) Before adopting a rule, an agency shall give notice of a public hearing and offer any person a reasonable opportunity to present data, views and arguments pertaining to it. Unless otherwise provided by law, the notice shall be

³ The provisions contained in Ordinance 90-847 are also found in Chapter 5 of the Wayne County Code of Ordinances.

given at least ten days before the hearing and at least 20 days before adoption of the rule. The notice shall include all of the following:

(1) An exact reference to the statutory, charter or ordinance authority under which the rule is made.

(2) A concise summary of the key terms of the rule, and its proposed effective date.

(3) The time and place of the public hearing, and how, where and when data and viewpoints may be submitted to the agency other than at the hearing.

(g) Before setting a public hearing on a proposed rule, agencies subject to supervision of the chief executive officer shall also obtain his or her approval. All county agencies shall provide a copy of a proposed rule to the corporation counsel, who shall rule on the legality and liability potential of the proposed rule. The legislative research bureau shall advise the agency as to matters of form, citation, classification, arrangement, numbering, cross-reference, textual clarity and the need or not for county commission approval.

(h) Each agency shall keep a mailing list of persons who ask notice of proposed rules. A renewal card shall be sent to each person each January to update and purge the list. Notice shall be mailed first class to all listed persons as to each pertinent public hearing.

(i) The agency shall publish the notice of public hearing as required by law or ordinance, and if none, then in a manner best calculated to give notice to those persons likely to be affected by the proposed rule, such as: a newspaper of general circulation, or a trade journal, or neighborhood newsletters, depending on circumstances.

* * *

(k) An agency shall submit the proposed rule, revised when appropriate due to the public hearing, to the county commission by delivering six copies to the clerk thereof. The chairman shall refer the proposed rule to the most appropriate standing committee or committees for prompt consideration. The clerk shall retain one copy for commission files, and post one copy on a common bulletin board to which other commissioners may refer. The proposed rule shall be considered by the committee to which transmitted within 15 days. If approved by all committee members, it shall be deemed approved by the commission, and so certified by the clerk to the issuing agency. If not approved, the proposed rule shall be forwarded to and scheduled for full board action within 30 days of receipt. If not rejected within 30 days of receipt, a rule is effective.

* * *

(o) A rule shall not be valid and enforceable unless processed in substantial compliance with the notice requirements of this chapter. Failure, however, to give a person notice of a proposed rule shall not invalidate the rule if those persons who are in fact notified are reasonably representative of the interests and viewpoints of the classes affected by the rule.

Ordinance 90-847, § 6, exempts certain rules from the requirements of notice and commission approval, including “[a] determination, decision, order or opinion in a case,” “[a] declaratory ruling or opinion as applied to a fixed and stated set of facts,” and “[a]n individual decision by an agency to exercise or not to exercise a legal power, although private rights and interests are affected by that decision.” The exemptions in § 6, however, are subject to Ordinance 90-847, § 7, which provides, in pertinent part:

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 the following matters, shall not be valid and of effect unless in full compliance with the commission approval requirements of this chapter:

(1) Fix the rate of compensation for county officers and employees, including fringe benefits, per diem rates and lump sum payments in lieu of reimbursed expenses, where these rates are not otherwise fixed by contract or law. [Emphasis added.]

Council 25 principally relies on Ordinance 90-847, § 7, and contends that commission approval before implementation of the LBO was required because the LBO affected county employees’ rates of compensation and benefits. The plain language of § 7, however, pertains to “the internal management, organization or procedures of an agency[.]” Moreover, as is readily apparent from the other quoted provisions of Ordinance 90-847, the ordinance involves agency rulemaking and is wholly inapplicable to collective bargaining and negotiations, a matter that § 4.323 of the Wayne County Charter imparted to the labor relations division, under the direction of the CEO. Because Ordinance 90-847 does not apply to the collective-bargaining process, the trial court erred by relying on the ordinance and granting partial summary disposition for Council 25. As previously discussed, the labor relations division, under the CEO’s direction, was authorized to implement the LBO as part of the negotiation process in an effort to reach a successor CBA. Accordingly, defendants were entitled to summary disposition in their favor.

Further, we note that MCL 46.11(g) empowered the commission to approve county employee salaries once a successor CBA was reached. That provision states:

A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:

* * *

(g) Prescribe and fix the salaries and compensation of employees of the county if not fixed by law

Under this provision, once negotiations resulted in a successor CBA, the commission had the authority to approve employee salaries before the new CBA took effect. The parties indicated at oral argument that this process is the one that was actually used when plaintiffs and defendants reached a successor CBA at year's end 2011. Thus, the commission ultimately had the opportunity to ratify the successor CBA, including approving employee salaries, and did so before the CBA took effect. Notably, the procedure outlined in Ordinance 90-847, § 3, was not employed when the parties reached a successor CBA. Rather, the CBA was placed on the commission's agenda and simply ratified. The process that was used confirms our conclusion that Ordinance 90-847 is inapplicable in these circumstances. Moreover, application of the ordinance in these circumstances would conflict with the Wayne County Charter because it would infringe on the exclusive authority conferred on the executive to negotiate CBAs. See Wayne County Charter, § 4.323. To accept the interpretation of Council 25 would require the legislative branch, the commission, to intrude into the negotiation process, exclusively granted to the executive, rather than to perform its overseeing function in ratifying or rejecting the CBA upon its submission.

Having determined that the trial court erred by denying summary disposition for defendants, we need not address defendants' argument that governmental immunity precluded plaintiffs from proceeding on the issue of damages.

Reversed and remanded for entry of summary disposition in defendants' favor. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald