STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT, Respondent-Appellee,	UNPUBLISHED October 18, 2011
v	No. 296135 MERC
DETROIT POLICE OFFICERS ASSOCIATION, Charging Party-Appellant.	LC No. 07-000110

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Charging party appeals as of right from the Michigan Employment Relations Commission's (MERC) order dismissing charging party's unfair labor practice charge against respondent. On appeal, charging party argues that MERC erred when it concluded that charging party had not raised an unfair labor practice charge because the arbitration award was not reviewable by MERC and had not been repudiated by respondent. We affirm.

Charging party first argues that MERC failed to properly apply precedent from the National Labor Relations Board (NLRB), prohibiting the post-impasse implementation of policies that undermine the duty to bargain. We disagree.

"MERC's findings of facts are conclusive if supported by competent, material, and substantial evidence on the whole record." *Oak Park Pub Safety Officers Ass'n v City of Oak Park*, 277 Mich App 317, 323-324; 745 NW2d 527 (2007). Further, MERC's "legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Id*. at 324.

In this case, the parties reached an impasse on the subject of healthcare plans relating to hospitalization. Pursuant to MCL 423.231 *et seq*. (Act 312), the issue was submitted to compulsory arbitration. The resulting arbitration award (Act 312 award) called for the implementation of respondent's proposed policy. Respondent implemented the policy but charging party alleged that, because the award gave respondent "carte blanche" authority over its implementation, it eviscerated the duty to bargain on this issue. MERC ruled that it did not have the authority to review the Act 312 award.

Public employment labor issues are governed by the Public Employment Relations Act (PERA), MCL 423.201 *et seq*. Our Supreme Court has summarized the underlying purpose of the PERA:

> Public labor relations in Michigan are governed by PERA. One of PERA's primary purposes is to resolve labor-management strife through collective bargaining. Under PERA a public labor union may not strike when disagreements arise in the collective bargaining process. Because public sector labor unions in Michigan lack the right to strike, they lack a significant tool to leverage their bargaining position. [*Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit*, 482 Mich 18, 28-29; 753 NW2d 579 (2008) (internal quotation omitted).]

"MERC is the sole state agency charged with the interpretation and enforcement of this highly specialized and politically sensitive field of law." *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 631; 669 NW2d 315 (2003) (citation omitted). MERC's jurisdiction is limited to hearing charges of unfair labor practices. MCL 423.216.

As set forth in its own terms, Act 312 is "supplementary" to PERA. In *Detroit Fire Fighters Ass'n IAFF Local 344*, 482 Mich at 29-30, our Supreme Court explained:

> Act 312 was intended, in the specific context of police and firefighter unions, to redress the imbalance in bargaining power created by the prohibition of strikes, and to preclude the possibility of an illegal strike by these unions that provide vital public services, namely police and fire protection.
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> * * *
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> Thus, under Act 312, if the public employer and the police officers' or fire fighters' bargaining unit have not reached an agreement concerning a mandatory subject of bargaining, and mediation proves unsuccessful, either party may initiate binding arbitration in order to avert a strike. [*Id.* (internal quotation omitted.]

Finally, MCL 423.240 (in Act 312) provides:

> A majority decision of the arbitration panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside.

"Act 312 is separate and distinct from PERA." *Jackson Fire Fighters Ass'n, Local 1306, AFL-CIO v City of Jackson (On Remand)*, 227 Mich App 520, 523; 575 NW2d 823 (1998) (internal quotation omitted). However, "an Act 312 panel functions under MERC's auspices and is obliged to follow applicable MERC decisions." *Id*. at 525 (internal quotation omitted).

Charging party argues that respondent committed unfair labor practices in its *implementation* of the Act 312 award; therefore, MERC had jurisdiction to adjudicate charging

party's charge. Charging party relies primarily on *McClatchy Newspapers, Inc*, 321 NLRB 1386; 153 LRRM 1137 (1996), a decision of the National Labor Relations Board (NLRB). Indeed, "[i]n construing the PERA, [our Supreme Court] frequently looks to the interpretation of analogous provisions of the [National Labor Relations Act] by the federal courts." *Grandville Mun Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). The NLRB in *McClatchy* ruled that when an employer implements a proposal after a collective bargaining impasse—on an issue subject to collective bargaining—there must be participation by the union in the implementation or some objective guidelines for the implementation. *McClatchy*, 321 NLRB at 1391. Otherwise, by bargaining to an impasse and then unilaterally implementing its proposal, an employer could avoid its obligation to bargain on that issue "while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *Id*. Importantly, it was the "employer's insistence that it not be restricted in exercising its discretion," that was "inherently destructive of the fundamental principles of collective bargaining." *Id*. at 1390-1391. The NLRB expressly noted that it was making a "modification of the impasse doctrine" with its ruling in *McClatchy*. *Id*. at 1392.

Charging party contends that *McClatchy* is closely analogous to this case because respondent's implementation of the hospitalization policy contained no objective criteria limiting its application and did not permit charging party a role in its implementation. However, as MERC concluded, regardless of whether charging party's factual allegations are true, the Act 312 award makes this case distinguishable from the rule created in *McClatchy*. An Act 312 award *is* the agreement of the parties. The award "shall be final and binding upon the parties." MCL 423.240. In contrast, the rule in *McClatchy* contemplates circumstances where the parties have not reached an agreement. In Michigan, the Legislature has concluded that where there is an impasse between a police officers' union and an employer, the issue must be submitted to "compulsory arbitration." MCL 423.231. The arbitration panel's decision is "final and binding." MCL 423.240. Whereas in *McClatchy*, the goal of the rule created was to "break impasse and restore active collective bargaining," 321 NLRB at 1391, the goal of Act 312 is to "afford an alternate, expeditious, effective and binding procedure for the resolution of disputes." MCL 423.231. The circumstances contemplated in *McClatchy* were not present in this case.

Charging party focuses on the language in *McClatchy* prohibiting "carte blanche" implementation of an employer's proposal, arguing that respondent improperly implemented its hospitalization proposal without union input or objective guidelines. However, since Act 312 renders the underlying rationale of the rule in *McClatchy* completely inapplicable to the facts of this case, there is no reason to import the rule into this factual situation.

Another component of charging party's argument is that it is not challenging the substance of the Act 312 award, but merely the implementation of it. The substance of charging party's argument belies this contention. Charging party's sole argument challenging respondent's implementation of the award as a violation is that the award itself was a "*McClatchy*-type [last best offer]." In other words, the only way respondent could have avoided committing an unfair labor practice, in charging party's view, would have been to decline to implement the Act 312 award despite its binding nature. Charging party views the arbitration *award* as lacking the safeguards required to avoid destruction of the collective bargaining process. This argument does not pertain to respondent's *conduct* in implementing the award.

See MCL 423.210; MCL 423.216 (improper *conduct* required for unfair labor practice). It is merely a direct attack on the substance of the award. The MERC did not err.

Next, charging party argues that the issue of premiums related to the hospitalization plan was not properly addressed by the Act 312 arbitration; therefore, they remain a proper subject of bargaining, not to be contravened simply because of impasse. This is clearly another challenge to the arbitration process and award which are reviewable in circuit court, not by MERC. MERC's jurisdiction is defined exclusively by statute as governing unfair labor practices. MCL 423.216. Moreover, Act 312 provides that orders of Act 312 panels "shall be reviewable by the circuit court." MCL 423.242. The MERC did not err when it concluded that charging party's claim was not properly before it.

Next, charging party argues that MERC erred when it concluded that charging party had not alleged facts demonstrating that respondent had repudiated the Act 312 award. Relatedly, charging party argues that MERC erred when it concluded that it must interpret the award in order to determine whether repudiation existed.

As MERC stated in its decision, "[a]n alleged breach of contract is not an unfair labor practice unless a repudiation is found. Repudiation exists when 1) the contract breach is substantial, and has a significant impact on the bargaining unit and 2) no bona fide dispute over interpretation of the contract is involved." See *Gibraltar Sch Dist v Gibraltar Custodial-Maintenance Assoc*, 16 MPER 36, p 2 (2003). Repudiation occurs when "a party to a contract unequivocally declares the intent not to perform." *Stoddard v Mfr's Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999). MERC's jurisdiction is limited to hearing unfair labor practice charges. MCL 423.216. MERC concluded that because there is a dispute over the interpretation of the award, there was no repudiation and, thus, no unfair labor practice for it to hear.

Charging party argued that the award clearly called for an open enrollment period prior to the implementation of the new hospitalization policy. The award stated, "[Respondent] shall make available the following hospitalization plans: . . . ." Charging party argues that in order to make the plans available, there must be an open enrollment period. Respondent argues that the language of the award does not require an open enrollment period. Clearly, there is a dispute regarding the method for making the plan available, which was not set forth in the award. Thus, MERC did not err when it concluded that repudiation was not demonstrated.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen