2005-08

STATE OF MICHIGAN

IN THE SUPREME COURT

GERALD T. SLOAN,

Plaintiff/Counter-Defendant
Appellee

Supreme Court
No. 130027

v

CITY OF MADISON HEIGHTS,

Court of Appeals
No. 254371

Oakland Circuit Court
LC No. 2002-045806 CK

Defendant/Counter-Plaintiff
Appellant.

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE

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Defendant/Counter-Plaintiff answers:	"Yes"
Amicus Curiae answers:	"Yes"
Plaintiff/Counter-Defendant answers:	"No"

II. WHETHER THIS COURT SHOULD RECONSIDER ITS MARCH 22, 2006 ORDER PEREMPTORILY REVERSING THE COURT OF APPEALS AND RULING IN FAVOR OF THE PLAINTIFF WHERE THIS COURT ADOPTED A PLAIN MEANING READING OF COLLECTIVE BARGAINING AGREEMENTS UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT WHICH CONFLICTS WITH THE PRECEDENT FROM THIS COURT, THE COURT OF APPEALS AND THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION CONCERNING THE EFFECT OF PAST PRACTICE IN THE INTERPRETATION OF SUCH AGREEMENTS?

Defendant/Counter-Plaintiff answers:	"Yes"
Amicus Curiae answers:	"Yes"
Plaintiff/Counter-Defendant answers:	"No"

II. WHETHER THIS COURT SHOULD RECONSIDER ITS MARCH 22, 2006 ORDER PEREMPTORILY REVERSING THE COURT OF APPEALS AND RULING IN FAVOR OF THE PLAINTIFF WHERE THE COURT'S ORDER WILL RESULT IN CONFUSION CONCERNING THE OBLIGATIONS OF PUBLIC EMPLOYERS AND LABOR UNIONS AND WILL EXPOSE PUBLIC EMPLOYERS TO UNKNOWABLE AND UNPREDICTABLE RETIREE HEALTH INSURANCE COSTS?

Defendant/Counter-Plaintiff answers:	"Yes"
Amicus Curiae answers:	"Yes"
Plaintiff/Counter-Defendant answers:	"No"

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to MCR 7.302(C)(2) and 7.313(E).

STATEMENT OF FACTS

Amicus Curiae Michigan Municipal League ("the League") is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 519 Michigan cities and villages of which 437 are also members of the Michigan Municipal League Legal Defense Fund. The League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This brief *amicus curiae* is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the President and Executive Director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, city attorney, Rockwood; Randall L. Brown, city attorney, Portage; W. Peter Doren, city attorney, Traverse City; Andrew J. Mulder, city attorney, Holland; Clyde Robinson, city attorney, Battle Creek; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor and William C. Mathewson, general counsel, Michigan Municipal League.

In addition to the facts set forth above, the League adopts the Statement of Facts set forth by the City of Madison Heights in their Motion and Brief to this Court.

ARGUMENT

I. THE COURT SHOULD GRANT THE CITY OF MADISON HEIGHT'S MOTION FOR RECONSIDERATION AS ITS MARCH 22, 2006 ORDER APPLIES A COMMON-LAW STANDARD OF INTERPRETATION TO A COLLECTIVE BARGAINING AGREEMENT.

This Honorable Court should reconsider its March 22, 2006 Order as that Order appeared to adopt a "plain language" rule of interpretation to the collective bargaining agreement at issue in this case. However, the Court's Order failed to address the unique nature of collective bargaining agreements. It has been well-recognized that collective bargaining agreements are unique contracts

which must be interpreted under rules that differ from other contracts or statutes. For example, in *Transportation-Communication Employee's Union v. Union Pacific Railroad Co.*, 385 US 157; 87 S Ct 369 (1966), the United States Supreme Court addressed an argument that a collective bargaining agreement could be governed by the same common-law principles applicable to private agreements. The Court stated:

> We reject this line of reasoning. A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. *Id.*, 385 US at 160-161; 87 S Ct at 371.

The Court then wen on to hold that a collective bargaining must be viewed as:

> [A] generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. * * * The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or a particular plant. *Id.*, 385 US at 161; 87 S Ct at 371 *quoting United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 US 574, 578-579; 80 S Ct 1347, 4 L Ed 2d 1409 (19)

Of particular importance in this matter, the United States Supreme Court also made the following observation:

> In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. *Transportation-Communication Employees Union, supra*, 385 US at 161; 87 S Ct at 371.

This principle has been repeatedly reaffirmed by the Courts. For example, the United States Court of Appeals for the Seventh Circuit recently observed that, "A collective bargaining agreement is a long-term relational contract, whose interstices properly may be flushed out with what often goes by the name of "the law of the shop." *International Union of Operating Engineers, Local 139, AFL-CIO v. J.H. Findorff & Son, Inc.*, 393 F3d 742, 746 (CA 7, 2004). Likewise, the United States Court of Appeals for the Sixth Circuit also noted that, "A collective bargaining agreement is not governed by the same principles of interpretation applicable to private contracts." *International*

Union, United Mine Workers of America v. Apogee Coal Co., 330 F3d 740, 744 (CA 6, 2003) *quoting Operating Eng'rs Pension Trusts v. B & E Backhoe, Inc.*, 911 F2d 1347, 1352 (CA 9,1990). Significantly, a collective bargaining agreement must be interpreted consistently with applicable labor laws and policy. *Sterling Fluid Systems (USA), Inc. v. Chauffeurs, Teamsters & Helpers Local Union #7*, 322 F Supp 2d 837 (W.D. Mich. 2004). A collective bargaining agreement should also be read as whole in order to harmonize and give effect to all its provisions. *Id.*, 322 F Supp 2d at 844.

In Michigan, the Public Employment Relations Act (PERA), MCLA §423.201 *et seq.*, sets the statutory scheme governing public employment. In fact, this Court has repeatedly recognized that PERA dominates all other statutes and laws pertaining to issues related to public employee labor relations. See, e.g., *Local 1383, IAFF, AFL-CIO v City of Warren*, 411 Mich 642; 311 NW2d 702 (1981); *Rockwood v Crestwood School District*, 393 Mich 616; 227 NW2d 736 (1975); *Wayne County Civil Service Commission v Board of Supervisors*, 384 Mich 363; 184 NW2d 201 (1971). This Court has also recognized that it is appropriate to look to guidance from the federal courts in interpreting the provisions of PERA. *Port Huron Educ. Ass'n, MEA/NEA v. Port Huron Area School Dist.*, 452 Mich 309, 317 fn 13; 550 NW2d 228 (1996).

This Court's March 22, 2006 Order relies upon the "plain language" of the parties' Agreement. However, the Order does not appear to consider the "practice, usage and custom" of the parties involved in the Agreement. The affidavits submitted by the City show that the City and the union which represented the Plaintiff have entered into a series a labor agreements. Indeed, the affidavits show that this bargaining relationship goes back over multiple decades. Thus, this is clearly a "long-term relational contract" which should not be interpreted using rules of construction suited for private contracts. Collective bargaining agreements, such as this one, are also unique

because they apply to people and their careers. They set the salary and benefits for those individuals who provide public service for the citizens of Michigan. These agreements necessarily evolve and should not be interpreted using common-law standards of construction.

As stated below, both this Court, the Court of Appeals and the Michigan Employment Relations Commission (the statutory agency charged with administering PERA) have articulated a clear policy favoring the consideration of the past practices of the parties in interpreting collective bargaining agreements. Further, such agreements should be read as a whole. This Court's Order appears not to have considered the City's evidence of a long-standing past practice in the City and appears to have rejected the Court of Appeals "four corners" reading which sought to read the agreement as a whole. Thus, the Court's Order appears to be inconsistent with recognized standards for the interpretation of collective bargaining agreements and the labor policy of this state. As such, the Court should grant the City's motion and reconsider its March 22, 2006 Order.

II. THE COURT SHOULD GRANT THE CITY OF MADISON HEIGHT'S MOTION FOR RECONSIDERATION AS ITS MARCH 22, 2006 ORDER APPEARS TO CONFLICT WITH PRIOR DECISIONS FROM THIS COURT, THE COURT OF APPEALS AND THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION.

This Court, the Court of Appeals and the Michigan Employment Relations Commission have repeatedly instructed that public employers and labor organizations may supplement and amend the terms of their collective bargaining agreements through their past practice. However, this Court's March 22, 2006 Order failed to explicitly address this issue and simply relied upon the "plain language" of the terms at issue. Thus, the Court's Order gives the appearance that this Court is either overruling or calling into question precedent of this Court, the Court of Appeals and the Michigan Employment Relations Commission.

In *Amalgamated Transit Union, Local 1564, AFL-CIO v. Southeastern Michigan Transp. Authority*, 437 Mich 441, 473 NW2d 249 (1991), this Court held that the application of a

disciplinary procedure had become applicable to probationary employees at SEMTA even though such application was not provided for in the parties' collective bargaining agreement. In so holding, this Court found that a past practice of the parties becomes a binding term and condition of employment which cannot be modified except through collective bargaining. This Court held:

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment." *Id.* 437 Mich at 454-455, 473 NW2d at 255 (footnotes omitted).

In *Port Huron Educ. Ass'n, supra*, this Court addressed the issue of whether a past practice can create a binding past practice even where the applicable collective bargaining agreement contains language which covers the topic of the practice. The Court stated the issue and its holding as follows:

> A primary goal of the public employees relations act is to resolve labor-management strife through collective bargaining. *Detroit Police Officers Ass'n v. Detroit*, 428 Mich. 79, 95, 404 N.W.2d 595 (1987) (opinion of Boyle, J.). In furtherance of this goal, the PERA imposes a duty on public employers to bargain in good faith over "wages, hours, and other terms and conditions of employment...." M.C.L. § 423.215(1); M.S.A. § 17.455(15)(1). The parties do not dispute the general principle that "[a] past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties." *Amalgamated Transit Union v. Southeastern Michigan Transportation Authority*, 437 Mich. 441, 454, 473 N.W.2d 249 (1991). Rather, the question presented is whether a past practice that is contrary to clear contract language can create a term or condition of employment. **We hold that the unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. The party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract.** *Port Huron Educ. Ass'n, supra*, 452 Mich at 311-312; 550 NW2d at 232 (footnotes omitted, emphasis added).

Thus, even where the contract contains unambiguous language, a past practice which meets the requirements set forth in *Port Huron Educ. Ass'n* creates a binding term and condition of employment. It is a violation of both the terms of PERA and the policy behind the Act for a party to change such a term of employment without proceeding through good-faith bargaining. Indeed, the *Port Huron* Court specifically noted that:

> Under the PERA, an employer commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless the employer has fulfilled its statutory obligation or has been freed from it. *Id.*, 452 Mich at 309; 550 NW2d at 228 (footnotes omitted).

The Court of Appeals and the Michigan Employment Relations Commission have also reached similar rulings. For example, in *Flint Professional Firefighters Union Local 352 v. City of Flint*, unpublished per curiam opinion of the Court of Appeals, issued June 17, 2004 (Docket Nos. 244953, 244961, 244985)(Ex. A), the Court of Appeals found that the City of Flint committed an unfair labor practice by issuing an ordinance with modified what the Court of Appeals found to be a binding past practice.

Similarly, the Michigan Employment Relations Commission has found that past practices may create binding terms of employment. For example, in *Wexford County Board of Public Works, Landfill Division*, 1998 MERC Lab Op 160, the Commission found that the employer committed an unfair labor practice by terminating the salvage rights of certain employees in light of recognized past practice. Similarly, in *City of Oak Park*, 1997 MERC Lab Op 126, the Commission found that the employer could require employees to attend fitness for duty psychological examinations, but could not require the employees to sign waivers in connection with those examinations. The Commission based its decision upon the specific contours of the parties' past practice. *Id.*, 1997 MERC Lab Op at 131.

This Court, the Court of Appeals and the Michigan Employment Relations Commission have clearly articulated the law of this state: a past practice can create a binding term and condition of employment. This is true even where the parties' contract contains language which unambiguously covers the topic. *Port Huron Educ. Ass'n*, *supra*, 452 Mich at 311-312, 325-326; 550 NW2d at 232, 237-238. Public employers, labor organizations, employees and retirees throughout this state have come to rely upon these well articulated legal principles.

Unfortunately, this Court's March 22, 2006 Order in this case threatens to disrupt this legal doctrine and to interject confusion into the law governing public sector labor relations. Indeed, the Court's Order appears to adopt a strict "plain language" reading which does not even consider the evidence of a past practice between the parties.[1] Thus, this Order is likely to create confusion in this area of the law. Indeed, it is not at all clear whether the Court is signaling a retreat from the principles articulated in *Amalgamated* and *Port Huron Educ. Ass'n*. There is no doubt that this Court has the authority, within the confines of *stare decisis*, to overrule those cases or to reshape the contours of their holdings. However, the League, as *amicus curiae*, respectfully would ask that this Court only do so after full argument so that the Plaintiff, the City and other interested parties can provide argument to the Court which would assist in this Court's decision. The League would also suggest that the Court articulate any change in this area through a published decision so that public employers, labor organization and employees can be aware of this Court's decision. Therefore, the public interest would clearly be served in the granting of the City's Motion for Reconsideration.

[1]Due to its holding, the Court of Appeals in this matter did not need to reach this issue.

III. THIS COURT'S DECISION EXPOSES THE CITY, AND AN UNKNOWN NUMBER OF OTHER PUBLIC EMPLOYERS, TO SIGNIFICANT LIABILITY.

The League also must stress to the Court the significance of its decision. The League's member communities have been greatly affected by the dramatic increases in the costs of health insurance, particularly retiree health care. It is has become increasingly difficult to plan for these costs, even when those individuals entitled to coverage are known. Now, under this Court's March 22, 2006 Order, the City faces the risk of retirees remarrying and providing coverage to the new spouses. The City will suddenly be exposed to much greater liability if the new spouse is significantly younger and, therefore, can be expected to live and use health insurance much longer.

It is unknown by the League precisely how many of its member communities will be affected by the Court's order. However, the League anticipates that the number will be significant. Additionally, this decision may affect cities and villages who are not League members, as well as communities that operate under other forms of government (i.e. townships and counties). Further, an unknown number of jurisdictions provide retiree health coverage not only to spouses, but also dependents. Under the Court's March 22, 2006 Order, a public employer could see its health care liability multiply in the event that a retiree remarries into a family with children or other dependants.

The dollar impact cannot be underestimated. However, the truly difficult aspect is that the dollar impact cannot be fully known. A responsible municipality that has accurately prepared itself for its retiree health care costs can see those plans rendered useless if retirees are allowed to add new spouses and new dependants. Indeed, there is no way in which a responsible municipality can anticipate such needs. Further, it is important to note that this increased and uncertain liability can only be funded by the citizens of this state through either increased taxes or decreased services.

The League submits that the impact of the Court's Order along merits reconsideration of the Court's Order and affirmance of the Court of Appeals.

IV. THE CITY'S MOTION FOR RECONSIDERATION SHOULD ALSO BE GRANTED AS THE MARCH 22, 2006 ORDER APPEARS TO RUN CONTRARY TO THIS COURT'S HOLDING IN *STUDIER V. MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD.*

This Court should also grant the City's Motion because the March 22, 2006 Order appears to contradict one of the central holdings of this Court's decision in *Studier v. Michigan Public School Employees' Retirement Board,* 472 Mich 642; 698 NW2d 350 (2005). In *Studier*, this Court articulated the principal that legislative bodies should not be bound by unknown or uncertain commitments. Rather, *Studier* showed that the Courts are reluctant to impose such obligations unless the legislature has clearly committed to it. While the Court's decision focused upon consideration of statutory language, the League submits that these considerations are relevant here. The City Council of Madison Heights clearly relied upon the past practice concerning retiree spousal health insurance. As seen in the affidavits submitted by the City, this past practice held that the term "spouse" referred to a spouse at the time of retirement. This was the obligation undertaken by the City Council. The Court's March 22, 2006 Order now expands this commitment. However, there does not appear to have been any agreement by the City Council to be bound this commitment. As such, this Court should, at a minimum, grant the City's motion and reconsider this case in light of the *Studier* case.

RELIEF REQUESTED

The *Amicus Curiae* Michigan Municipal League respectfully requests that this Honorable Court grant the Defendant/Counter-Plaintiff/Appellee's Motion for Reconsideration, vacate its March 22, 2006 Order, and affirm the Court of Appeal's decision awarding summary disposition to the City. At a minimum, *Amicus Curiae* Michigan Municipal League respectfully requests that

this Honorable Court vacate its March 22, 2006 Order and set the matter on its calendar for complete briefing, argument and consideration by this Honorable Court.

Respectfully submitted,

KELLER THOMA, P.C.

By: _____
Dennis B. DuBay (P12976)

By: _____
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Dated: April 25, 2006
1865SloanAmicus.wpd

STATE OF MICHIGAN

IN THE SUPREME COURT

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AFFIDAVIT

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

Richard W. Fanning, Jr., being first duly sworn, deposes and says that he is an attorney for the Michigan Municipal League, that he has read the foregoing Motion for Leave to Appear as Amicus Curiae and the accompanying Brief, and that the contents thereof are true to the best of his knowledge.

Richard W. Fanning, Jr.

Subscribed and sworn to before me
this 25th day of April, 2006

KATHRYN SMITH SIGMAN
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES May 16, 2006
ACTING IN WAYNE COUNTY, MI

STATE OF MICHIGAN

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State of Michigan)

County of Wayne)

PROOF OF SERVICE

Mary Thomas, being first duly sworn, deposes and says that on the 25th day of April 2006, she served a copy of Michigan Municipal League's Motion for Leave to Appear as Amicus Curiae, Notice of Hearing, Amicus Curiae Brief of the Michigan Municipal League, and this Proof of Service, upon:

Paul A. Baley, Esq.
236 South Broadway
Lake Orion, MI 48362

Howard L. Shifman
370 East Maple Road
Suite 200
Birmingham, MI 48009

Larry H. Sherman, Esq.
30700 Telegraph Road
No. 3420
Bingham Farms, MI 48052-4532

by placing copies of said documents in a sealed envelope plainly addressed to them with first class postage fully prepaid thereon and depositing said envelope in the United States mail at Detroit, Michigan.

Mary E. Beard Thoma

Subscribed and sworn to before
me this 25th day of April, 2006

Kathryn Smith Sigman
Acting in _____ County, MI

KATHRYN SMITH SIGMAN
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES May 16, 2006
ACTING IN WAYNE COUNTY, MI