

PUBLIC EMPLOYMENT LAW IN MICHIGAN AND THE UNFAIR LABOR PRACTICE STRIKE

INTRODUCTION

I. THE NATIONAL LABOR RELATIONS ACT

- A. The Purpose and Theory Behind the Act
- B. The Balance of Power and the Unfair Labor Practice Strike

II. MICHIGAN PUBLIC EMPLOYMENT LAW AND THE PROHIBITED STRIKE

A. 1947-1965

- 1. *The Hutchinson Act*
- 2. *Case Law in Response to the Hutchinson Act*

B. 1966-1994

- 1. *The Public Employees Relations Act of 1965*
- 2. *Case Law in Response to the PERA Amendments*

C. 1994 and into the Future

- 1. *1994 Public Act 112*
- 2. *Case Law in Response to 1994 PERA Amendments*

III. PUBLIC POLICY

- A. Approaches to the Public Employee Labor Relations
- B. The Problem with Michigan's Approach to Public Employee Strikes

CONCLUSION

INTRODUCTION

Imagine the following:

Five public school teachers, also baseball fans, get together and decide to attend opening day at Comerica Park. Unfortunately, only two of the five have any days they are able to legitimately take off in order to attend the ball game. The three teachers that are unable to take any days off are advised by the other two teachers to call in sick. On opening day, the two teachers with days off available take their respective days, and the other three teachers collectively call in sick. The next day, the principal of the school calls all five into his office and states that all five will be docked a full days pay for their one-day strike and are immediately terminated.

Under the Michigan Public Employee Relations Act [hereinafter PERA], what result if the termination and fine is challenged? What if instead of attending a baseball game, the five teachers engaged in a work stoppage in order to protest the termination of their recently elected collective bargaining representative, an alleged unfair labor practice? How about if they stopped

working because of their public employer's refusal to bargain in good faith? Or, what if they wanted to pressure the local School Board to concede to their contract demands for more pay? Does it matter if they weren't public school teachers at all; but instead were public transit employees? Should these factors have an impact on the result? Does the result depend upon what year (and what version of PERA) the incident occurred? Should it?

This paper attempts to answer these questions by taking a historical look at how Michigan public employment law has evolved over the past half-century. In addition, this paper critically examines how the Michigan Legislature has treated labor-management relations in the public sector during this time period. In order to accomplish this, this paper focuses on Michigan's treatment of unfair labor practice strikes by public employees, and evaluates the Legislature's chosen policies by contrasting public employment law in Michigan with the machinery established under the National Labor Relations Act [hereinafter NLRA].

Part I begins by describing the NLRA, its purpose, the theories behind it, and the importance of a balance of power between capital and labor to successful collective bargaining. Part II describes the evolution of Michigan public employment law and collective bargaining under it; from the punitive Hutchinson Act of 1947, to the promise of PERA in 1965, and finally to the PERA Amendments of 1994. Part III looks at the policies behind public employment law and evaluates the Legislature's prohibition of unfair labor practice strikes by public school employees and the potential effect such a prohibition could have on collective bargaining in the public sector. This paper concludes with the position that the framework established by the NLRA is fully capable of addressing the concerns of the Michigan Legislature in prohibiting public employee strikes and that the Legislature's prohibition of unfair labor practice strikes was unnecessarily punitive.

I. THE NATIONAL LABOR RELATIONS ACT

A. The Purpose and Theory Behind the Act

In the private sector, labor-management relations are governed by the National Labor Relations Act [hereinafter the NLRA].¹ The NLRA has been controlling since Congress established the ground rules for labor relations in the United States by passing the Wagner Act in 1935.² The heart and soul of the Wagner Act are the rights protected by Section 7. Under section 7, private employees have the right to (1) organize, (2) bargain collectively, and (3) to engage in other concerted activities for the purpose of (a) collective bargaining or (b) “other mutual aid or protection.”³ Although the NLRA does not specifically address strikes, “other concerted activities” has consistently been held to include strike activity in the private sector.⁴

Section 7 rights were to be enforced and implemented through other sections of the Act⁵ which outlawed employer “interfere[nce] with, restrain[ment], or coerc[ion]” of employees exercising Section 7 rights,⁶ forbade “company-unions,”⁷ prohibited “discrimination . . . [intended] to encourage or discourage membership in any labor organization,”⁸ and imposed upon the employer the duty to bargain collectively in good faith with its employees’ selected representative.⁹

¹ National Labor Relations Act, 29 U.S.C. §§ 151-69 (1994).

² See Wagner Act of 1935, Pub. L. No. 74-198, 49 Stat. 449.

³ 29 U.S.C. § 157.

⁴ See Donna Williamson, *Teachers and Other Public Sector Employees: How Can We More Effectively Respond to the Concerted Activity Questions?*, 29 SANTA CLARA L. REV. 805, 813 (1989). “Utilization of this phrase in other collective bargaining statutes, in both private and public sectors, has been held to represent an express grant of the right to strike.” Williamson, *supra*.

⁵ See ARCHIBALD COX, ET AL., *LABOR LAW: CASES AND MATERIALS* 82 (13th ed. 2001).

⁶ See 29 U.S.C. § 8(a)(1).

⁷ See *id.* § 8(a)(2).

⁸ See *id.* § 8(a)(3).

⁹ See *id.* §§ 8(a)(5) & 9(a).

The purpose of the Act was both to provide workers with the ability and strength to increase their wages and standard of living *and* to reduce the number of labor disputes.¹⁰ The NLRA has been successful in achieving these dual goals for a number of reasons. By prohibiting employer unfair labor practices and requiring employers to recognize and bargain with their employees' appropriately selected representative, the NLRA serves to reduce strikes intended either to protest employer unfair labor practices or to force an employer to recognize and bargain with a representative.¹¹

Generally, however, collective bargaining really works for two reasons: (1) in and of itself, collective bargaining brings parties together; and (2) the threat of the strike and its resultant damage to both sides encourages parties to compromise.¹² There are arguably four reasons collective bargaining itself brings about a resolution to potential disputes.¹³ First, the collective bargaining process brings employers and employees together, forcing both sides to exchange viewpoints and narrow areas of disagreement.¹⁴ Second, recognition, experience, and maturity can bring responsibility to labor unions which encourages settlement and minimizes irresponsible union behavior.¹⁵ Third, collective bargaining replaces the weaker bargaining position of the individual employee with the organized employee collective, strengthening bargaining position and allowing unions to secure greater wages and labor standards.¹⁶ Finally,

¹⁰ See COX, *supra* note 5, at 83.

¹¹ See *id.* at 83. "Everyone who had been in a tough wage negotiation where the stakes were high knows that the bargain is never struck until one minute before midnight when there is no place to go, nothing left to do, no possible escape from choosing between a strike a compromise." *Id.*

¹² "[T]he strike or the fear of a strike is the motive power that makes collective bargaining operate." *Id.* at 489.

¹³ See *id.* at 83.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See COX, *supra* note 5, at 83.

by rule of law, collective bargaining removes the unilateral implementation of employer objectives and replaces it with bilateral discussion.¹⁷

But even though the collective bargaining process itself tends to minimize labor disputes, the underlying motivation of the employer to bargain arises out of the employer's desire to avoid a costly work stoppage. As stated by one group of commentators:

[i]n the final analysis collective bargaining works as a method of fixing terms and conditions of employment *only* because there comes a time when both sides conclude that the risks of losses through a strike are so great that compromise is cheaper than economic battle.¹⁸

The strike as an economic weapon serves to balance bargaining power between labor and management and thereby promote collective bargaining between relative equals.

B. The Balance of Power and the Unfair Labor Practice Strike

Collective bargaining under the NLRA works because there has been a legislative and judicial focus on equalizing the relative bargaining power of management and labor. As stated by Justice Brennan in *NLRB v. City Disposal Systems, Inc.*¹⁹ --“in enacting § 7 of the NLRA, Congress sought generally to [legislatively] equalize the bargaining power of the employee with that of his employer.”²⁰ As an example of the judicial focus, the U.S. Supreme Court has consistently held that the use of the strike by a union to exert economic pressure on an employer during negotiations is consistent with the labor organizations reciprocal duty to bargain in good faith.²¹ As a result, an employer's duty to bargain does not terminate when private employees go

¹⁷ *See id.*

¹⁸ *COX, supra* note 5 at 488 (emphasis added).

¹⁹ 465 U.S. 822 (1984).

²⁰ *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

²¹ *See e.g., NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining.

on strike.²² This maintains pressure on the employer during an economic strike and maintains a balance between the interests of management and labor.

This balance can also be demonstrated by the judiciary's approach to unfair labor practice strikes. According to Supreme Court precedent, when an employee goes on strike in order to exert economic pressure on their employer, that striking employee retains their status as an employee during the strike.²³ As a result, "an economic striker who [subsequently makes themselves] . . . available . . . [for work] is entitled to full reinstatement unless there [are] legitimate and substantial business justifications for the failure to offer complete reinstatement."²⁴ The employer, however, may meet this burden by demonstrating that it hired permanent replacements for the striking workers in order to keep its business open.²⁵ In such a situation, the economic striker will not be entitled to his old job. This approach maintains a balance by considering both the legitimate interests of the employer in protecting its business and the interest of the employee in exerting economic pressure.

The NLRB and the judiciary have taken a different approach to employee work stoppages in response to employer unfair labor practices.²⁶ Where employees go on strike to protest an employer's unfair labor practice, and a striking employee applies for reinstatement, the employee

Id.

²² This is true as long as the use of economic pressure does not involve demands that fall outside the scope of "wages, hours and other terms or conditions of employment." Striking over "permissive" rather than "mandatory" subjects of bargaining will constitute a failure to bargain in good faith. See COX, *supra* note 5, at 536.

²³ See *Laidlaw Corp.* 171 N.L.R.B. 1366 (1966) ("by virtue of Section 2(3) of the Act, an individual whose work ceases due to a labor dispute remains an employee if he has not obtained other regular or substantially equivalent employment . . . and . . . an employer refusing to reinstate strikers must show that the action was due to legitimate and substantial business justifications").

²⁴ *Laidlaw*, 171 N.L.R.B. at 1366.

²⁵ See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[A]n employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue its business by supplying spaces left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

Id.

²⁶ See *infra* notes 29-40 and accompanying text.

is unconditionally entitled to his old job, regardless of the permanency of his replacement or any legitimate business justifications for refusing reinstatement.²⁷ In this situation, the additional societal interest in preventing employer unfair labor practices justifies a shift in leverage to the employees in order to prevent the employer from benefiting from its own unlawful conduct.²⁸

An unfair labor practice strike differs from an economic strike in other ways also. Where strikers engage in unprotected activity,²⁹ the NLRB has the power to reinstate terminated unfair labor practice strikers but does not have the power to reinstate terminated economic strikers.³⁰ Reinstatement of an unfair labor practice striker, however, will probably not be allowed where the striker has engaged in violence or a breach of the peace.³¹

Additionally, under the NLRA, statutory and contractual obligations not to engage in “strike” activity do not always prohibit unfair labor practice strikes.³² A work stoppage in response to an employer’s unfair labor practice will not be considered a “strike” within the contractual or statutory definition. In *Mastro Plastics Corp. v. NLRB*,³³ for example, the Supreme Court held that where employees went on strike in protest of an employer’s unfair labor practice,³⁴ the strike did not violate the “no-strike” clause in the collective bargaining

²⁷ See *In Matter of Shoe Brown CO.*, 1 N.L.R.B. 803 (1936) (“[a]n order requiring the [employer] to cease and desist from such conduct will not wholly restore the union to at least the position it occupied . . . on the day of {the unfair labor practice} strike. We, shall, therefore, in order to restore the status quo, order the [employer] to offer reinstatement to those employees . . . who went out on strike [in response to the employer’s unfair labor practice] . . . and . . . to displace [replacement] employees”).

²⁸ “First, the employer’s antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action. Second, reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union.” *Local 833, UAW v. NLRB (Kohler Co.)*, 300 F.2d 699 (D.C. Cir. 1962).

²⁹ Activity outside the protection of Section 7. See *supra* notes 5-9 and accompanying text.

³⁰ See *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954) (“[where the employees engage in unprotected activity,] the National Labor Relations Board has power under § 10(c) to order reinstatement if the discharges were not “for cause” and if such an order would effectuate the policies of the Act”). See also *COX*, *supra* note 5, at 585.

³¹ See *e.g.*, *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984).

³² See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

³³ 350 U.S. 270 (1956).

³⁴ The employer had terminated an employee for engaging in union activity during a “cooling off” period under Section 8(d). See *Mastro Plastics*, 350 U.S. at 270.

agreement.³⁵ According to the Court, a no-strike clause only prohibits economic strikes—not unfair labor practice strikes.³⁶ In addition, despite the strike occurring within a mandatory 60-day “cooling off” period under Section 8(d) of the NLRA, the strike was not prohibited because the *object* of the strike was not “termination or modification” of the contract and therefore compliance with the 60-day “cooling off” period was unnecessary.³⁷

Under the NLRA, determining the cause of a work stoppage (or the object of a strike) is necessary to determine the strike’s consequences. Where the strike is purely to exert economic pressure on the employer, or solely in response to an employer’s unfair labor practice, determining the cause is not difficult. The issue becomes more complicated, however, when what began as an economic strike has been prolonged because of an employer’s unfair labor practice.³⁸ In this situation, the unfair labor practice will “convert” the economic strike into an unfair labor practice strike.³⁹ Striking employees that are permanently replaced prior to the employer’s unfair labor practice are not entitled to reinstatement while striking employees permanently replaced during the unfair labor practice “phase” of the strike are entitled to reinstatement.⁴⁰

The distinction between unfair labor strikes and economic strikes serves two purposes. First, in the immediate sense, it discourages unfair labor practices by the employer. Second, and ultimately, the distinction serves to protect the balance of power between management and labor necessary for effective collective bargaining. In public employment law, however, the distinction becomes less clear and the balance of power more difficult to maintain because of many states’ prohibition of public employee strikes. Michigan is one such state that prohibits

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See e.g., Laidlaw*, 171 N.L.R.B. at 1366.

public employee strikes. In Michigan, however, the legislature has added an unnecessary level of complexity by prohibiting public school employee unfair labor strikes and thereby detrimentally affecting the balance of power between labor and management and ultimately the success of public employment collective bargaining.

II. MICHIGAN PUBLIC EMPLOYMENT LAW AND THE PROHIBITED STRIKE

A. 1947-1965

1. *The Hutchinson Act*

In 1947, the Michigan Legislature passed the Hutchinson Act,⁴¹ and established simple yet strict rules under which public employers and their employees were to deal with each other.

Although the Hutchinson Act required mediation of grievances submitted by a majority of a group of employees by the Labor Mediation Board,⁴² the Act prohibited strikes by public employees⁴³ and imposed mandatory penalties on striking public employees⁴⁴ and their supporters.⁴⁵ The Act defined “strike activity” in two ways. First, the Act defined a ‘strike’ as:

the failure to report for duty, the willful absence from one’s position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment.⁴⁶

Under this definition, even a single public employee could go on strike, if that employee stopped working in order to exert some concession from their employer related to the

³⁹ *See id.*

⁴⁰ *See COX, supra* note 5, at 583-86.

⁴¹ *See* Act of July 3, 1947, 1947 Public Act 336 (codified at MICH. COMP. LAWS. § 423.201-08 (Ann Arbor Press 1948) [hereinafter Hutchinson Act].

⁴² *See* Hutchinson Act § 7.

⁴³ *See* Hutchinson Act § 2.

⁴⁴ *See* Hutchinson Act § 4.

⁴⁵ *See* Hutchinson Act § 8.

⁴⁶ Hutchinson Act § 1.

“conditions, . . . compensation, . . . rights, privileges or obligations of employment.”⁴⁷ Second, the Act stated that “any [public employee] . . . who, by concerted action with others . . . wilfully absent[ed] himself from his position or abstain[ed] in whole or in part from the full, faithful and proper performance of his duties, shall be deemed to be on strike.”⁴⁸ Under this section, a concerted willful refusal to work, *regardless* of its purpose, although not a “strike” as defined by the statute, would be treated as if it were a strike.

Under the Hutchinson Act, the penalties for engaging in “strike activity” were mandatory, strict, and swift. Any public employee considered on strike “thereby abandon[ed] and terminate[d] his . . . employment [and was] no longer entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits.”⁴⁹ A public employee contesting such termination of employment was only entitled to a post-termination proceeding to determine whether or not the public employee was actually on strike or rightfully deemed to be on strike.⁵⁰ In addition, any person not a public employee who “knowingly incite[d], agitate[d], influence[d], coerce[d], or urge[d] a public employee to strike [was] . . . guilty of a misdemeanor . . . punish[able] by imprisonment for [up to] . . . 1 year, . . . a fine of [up to] . . . \$1,000.00, or both.”⁵¹ The potential reach of this provision was immense, bringing within its scope unions, union representatives, and even the entire public.

2. Case Law in Response to the Hutchinson Act

Four years after the enactment of the Hutchinson Act, the Michigan Supreme Court addressed the constitutionality of the Act’s prohibition of public employee strikes in *City of Detroit v. Division 26 of the Amalgated Association of Street, Electric Railway & Motor Coach*

⁴⁷ Hutchinson Act § 1.

⁴⁸ Hutchinson Act § 7.

⁴⁹ Hutchinson Act § 4.

⁵⁰ Hutchinson Act § 6.

Employers of America.⁵² In *City of Detroit*, the city filed a bill to enjoin an ongoing strike by public transit employees and for a declaration of the validity of the Hutchinson Act.⁵³ In response, the striking public employees filed a crossbill to prevent enforcement of the Act.⁵⁴

The Michigan Supreme Court upheld the validity of the Hutchinson Act and described the public policy reasons for a prohibition on public employee strikes. First, the Court reiterated that a public employee has no constitutional right to public employment, nor does public employment vest in public employees any “fixed or permanent rights of employment.”⁵⁵ Second, according to the Court “[t]here seem[ed] to be ample reason and authority for holding that the right of public employees to collectively refuse to render the service for which they [we]re employed differ[ed] in legal point of view from the right of private employees to strike.”⁵⁶ The distinction between public and private employment was justified because of (1) the importance of rendering essential government services;⁵⁷ (2) the absence of a right to strike under the common law;⁵⁸ and (3) the sovereignty principle.⁵⁹ For these reasons, a prohibition on

⁵¹ Hutchinson Act § 8.

⁵² 332 Mich. 237; 51 N.W.2d 228 (1951).

⁵³ See *City of Detroit v. Division 26 of the Amalgated Ass’n of Street, Electrical Railway & Motor Coach Employees of America*, 332 Mich. 237, 242; 51 N.W.2d 228 (1951).

⁵⁴ See *City of Detroit*, 332 Mich. at 242.

⁵⁵ *Id.* at 247.

⁵⁶ *Id.* at 248.

⁵⁷ See *id.* at 247-48.

To hold otherwise would result in public agencies being powerless to render public service and to effectively administer public affairs; and the public would thereby be deprived of its right to efficient government. For example, if the members of a fire department or of a police department collectively refuse to continue to serve except upon conditions insisted upon by them, . . . the public . . . would be deprived of fire or of police protection; and the right or power to exercise essential government affairs nullified.

Id. at 248. Fire fighters and police officers have since been allowed compulsory arbitration in an attempt to boost employee morale and efficiency and to replace the absence of a right to strike. See MICH. COMP. LAWS ANN. §§ 423.231-47 (West 2001). In addition, to a certain extent privatization and the essential services provided by private employees undermine this rationale today.

⁵⁸ See *City of Detroit*, 332 Mich. at 248. “Under the common law, . . . there is no right to strike on behalf of public employees . . . [since] it is a means of coercing the delegation of the discretion which a public board or public body must exercise in its fulfillment of its duties” *Id.* at 248-49 (quoting *City of Cleveland v. Division 268*, 41 Ohio Op. 236; 90 NE2d 711 (19__)). This reasoning today is at best questionable since public employees’ collective bargaining rights by their very nature interfere with the discretion of a public body or board. The legitimacy of the reasoning of *City of Detroit* was brought into serious question recently by the California Supreme Court in

public employee strikes was constitutional as was the immediate termination of employment of public employees that did go on strike.

Although its underpinnings have since been seriously questioned, *City of Detroit* established the validity of the Hutchinson Act’s prohibition of public employee strikes. *City of Detroit*, the Hutchinson Act’s broad definition of conduct deemed “strike activity” and the stiff penalties for participating or encouraging a strike were strong deterrents to public employee work stoppages of any kind, regardless of the statutory definition of “strike.” In the early 1960s, however, the Michigan Legislature reconsidered the punitive nature of the Hutchinson Act; and, in 1965, the Legislature amended the Act—radically altering the balance of power between labor and management.

B. 1966-1994

1. *The Public Employees Relations Act of 1965*

In 1965, the Hutchinson Act was amended to protect, as much as possible, the same rights protected in the private employment sector under the NLRA.⁶⁰ This fundamental shift provided public employees a meaningful voice in setting the terms and conditions of their employment. Although the Act still contained a prohibition on strikes by public employees, the Act now provided public employees with collective bargaining rights using the same language as the NLRA.⁶¹

California County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass’n, 38 Cal.3d 564; 699 P.2d 835 (1985) (finding that California’s longstanding prohibition on public-employee strikes under the California common law arbitrary and suggesting that all workers, both public and private, have the constitutional right to withhold labor incident to the right of association of federal and state constitutions such that the exercise of the right to strike could not be infringed upon absent a compelling justification). See also *infra* note 149 and accompanying text.

⁵⁹ “[Public employees] are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. . . . To say that they can strike is the equivalent of saying that they can deny the authority of government.” *Id.* at 248.

⁶⁰ See Act of July 23, 1965, 1965 Public Act 379 [hereinafter PERA].

⁶¹ See PERA §§ 9-16.

Section 7 of the NLRA provides:

Under what was now considered the Public Employees Relations Act [hereinafter PERA], public employees were granted considerable collective bargaining rights protected in an elaborate enforcement scheme. PERA gave public employees the right to form or join labor organizations and to engage in “lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to negotiate . . . through representatives of their own choosing.”⁶² PERA prohibited public employers from interfering, restraining, or coercing public employees in the exercise of these rights, initiating, creating, dominating, contributing to or interfering with any labor organization, or discriminating against labor organizations or public employees.⁶³

In addition, PERA provided a mechanism for the designation and election of an exclusive bargaining representative,⁶⁴ imposed a duty of good faith bargaining on the employer,⁶⁵ created a fact-finding procedure, analogous to the NLRA procedure, to resolve alleged violations of public employees’ section 10 rights,⁶⁶ and required mediation, upon the request of either the public employee representative or the public employer, to facilitate collective bargaining.⁶⁷

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157.

Section 9 of PERA provides:

[i]t shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid or protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

PERA § 9.

⁶² PERA § 9.

⁶³ See PERA § 10.

⁶⁴ See PERA §§ 11, 12 & 14.

⁶⁵ See PERA § 15.

⁶⁶ See PERA § 16. Section 10 stated:

Sec. 10. It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; (b) to initiate, create, dominate, contribute to or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or

The creation of collective bargaining rights in the public employment context was not the only departure from the Hutchinson Act. PERA also made significant changes with respect to its approach to public employee strikes. The 1965 amendments repealed the provisions relating to the automatic termination of striking public employees⁶⁸ and the imprisonment and fine penalties imposed upon non-public employees for their support of public employee strikes.⁶⁹

PERA also modified its definition of “strike activity.” The Hutchinson Act had contained two definitions of “strike activity.” The first had defined a strike by its motivation: a work stoppage by one or more public employees “for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment.”⁷⁰ The second had *deemed* conduct a strike regardless of its motivation if it was part of a “concerted action with others . . . to willfully absent[] [one]self from his position or [to] abstain[] in whole or in part from the full, faithful and proper performance of [one’s] duties.”⁷¹ PERA retained the first definition of “strike” and still required a determination that the willful absence from work was “for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment”⁷² in order for a work stoppage to be *defined* as a strike. PERA modified, however, the conduct that would

discourage membership in a labor organization; (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act; or (e) to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11.

PERA § 10. Section 9 provided:

Sec. 9. It shall be lawful for public employees to organize together to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate collectively with their public employers through representatives of their own free choice.

PERA § 9.

⁶⁷ See PERA § 7. Mediation is an aid to collective bargaining encouraged by law. See *Lake Michigan College Federation of Teachers v. Lake Michigan College*, 60 Mich. App. 747; 231 N.W.2d 538 (1975).

⁶⁸ See Hutchinson Act § 5.

⁶⁹ See Hutchinson Act § 8.

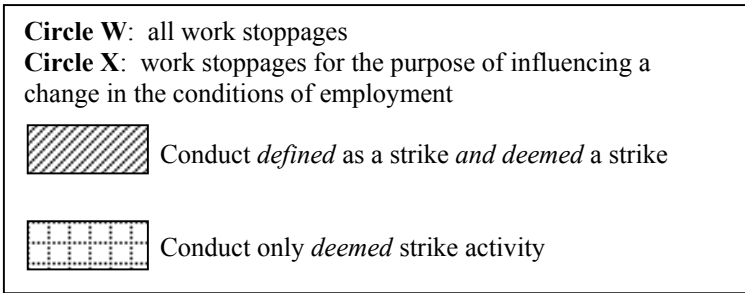
⁷⁰ Hutchinson Act § 1.

⁷¹ Hutchinson Act § 6.

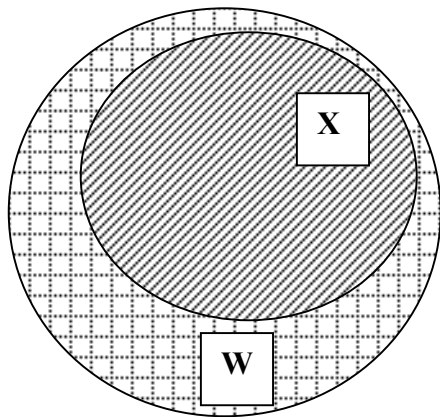
be *deemed* “strike activity.” Under PERA, the non-performance of one’s duties in “concerted action with others . . . for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment [was to] be *deemed* . . . strike [activity].”⁷³ In other words, under PERA, conduct *defined* a strike was the exact same conduct *deemed* a strike. Therefore, in order to be punishable under PERA, a work stoppage of any kind had to be for the purpose of influencing a change in the conditions of employment. The following diagram may help illustrate this distinction:

⁷² PERA § 1.

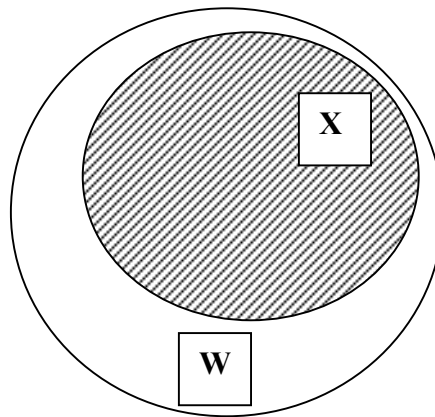
⁷³ PERA § 6 (emphasis added).



1947 Hutchinson Act



1965 PERA amendments



The difference in conduct deemed to be strike activity between the 1947 Hutchinson Act and the 1965 PERA amendments, coupled with the removal of the stiff penalties of the Hutchinson Act and the creation of collective bargaining rights in the public employment sector combined to create an atmosphere where economic weapons, previously little utilized in the public employment setting, were wielded with full force, especially in the public education sector. In addition, the similarities between PERA and the NLRA allowed the Michigan judiciary and the MERC to draw upon established U.S. Supreme Court precedent and policy interpretation of private sector labor law.

2. *Case Law in Response to the PERA Amendments*

Fairly quickly, Michigan Courts were presented with opportunities to interpret the changes to the Hutchinson Act and PERA's new approach to striking public employees.⁷⁴ In every major case, however, the striking employees were public school teachers, and, accordingly, the law that developed was a reaction to the public school teacher strike.

The Michigan Supreme Court first addressed the PERA amendments in 1967 in *School District for the City of Holland v. Holland Education Ass'n*.⁷⁵ In *City of Holland*, the Supreme Court held that the requirements for a labor injunction in the public employee context were the same as they were in the private sector.⁷⁶ In 1967, the teachers in the School District for the City of Holland refused to resume their teaching duties for the beginning of the school year.⁷⁷ The teachers did not contest that their conduct constituted a strike for the purposes of PERA.⁷⁸ The School District had easily obtained a temporary injunction simply by demonstrating to the

⁷⁴ *School District for the City of Holland v. Holland Education Ass'n*, 380 Mich. 314; 157 N.W.2d 206 (1968).

⁷⁵ 380 Mich. 314; 157 N.W.2d 206 (1968).

⁷⁶ See *City of Holland*, 380 Mich. at 325.

⁷⁷ See *id.* at 320.

Chancellor that “if the injunction did not issue, the district’s schools would not open.”⁷⁹

However, according to the Supreme Court:

The legislature intended that injunctive relief could be granted [under PERA], but that courts are not required to grant it in every case involving a strike by public employees. *To attempt to compel, legislatively, a court of equity in every instance of a public employee strike to enjoin it would be to destroy the independence of the judicial branch of government.*⁸⁰ . . . [I]t is . . . contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace.⁸¹

After *City of Holland*, for a public employer to enjoin a public employee strike, the public employer had to make a showing of “violence, irreparable injury, or breach of the peace” in order to gain relief. *City of Holland* is an important decision, not only because it established the independence of the judiciary, but also because it provided public employees with the ability to strike—so long as the public employer was unable to make the required showing.⁸²

The Michigan Supreme Court exerted further influence on the public employment collective bargaining process in *Rockwell v. Crestwood School District Board of Education*.⁸³ In *Rockwell*, after a lengthy labor dispute with the Crestwood School District Board of Education and unfair labor practice charges filed by the Crestwood Education Association against the School Board, the teachers of Crestwood Schools refused to commence the 1974 school year.⁸⁴ In October 1974, injunctive orders were issued and classes reconvened, but in December 1974, the teachers once again stopped working.⁸⁵ The School Board thereupon required teachers to

⁷⁸ *See id.*

⁷⁹ *Id.* at 326.

⁸⁰ *Id.* at 325.

⁸¹ *Id.* at 326 (emphasis added).

⁸² *See supra* notes 21-23 and accompanying text. The Supreme Court was denied the opportunity to rule on the constitutionality of the legislature’s determination that public school employee strikes should be enjoined without balancing of the equities in 1996. *See infra* notes 141-42 and accompanying text.

⁸³ 393 Mich. 616; 227 N.W.2d 736 (1975).

⁸⁴ *See Rockwell v. Crestwood School District Board of Education*, 393 Mich. 616, 626; 227 N.W.2d 736 (1975).

⁸⁵ *See Rockwell*, 393 Mich. at 626.

either report to work, submit a letter of resignation, or be terminated.⁸⁶ Thirty-eight teachers reported for work, one resigned, and 184 teachers were terminated.⁸⁷

In its opinion, the Court began its analysis by pointing out that PERA was “the dominant law regulating public employee labor relations.”⁸⁸ The Court then noted that the teachers claimed they justifiably refused to work “because they had not been able to negotiate a new labor contract since August, 1973.”⁸⁹ Undeniably then, the work stoppage was for the purpose of “coercing a change in the conditions . . . of employment.”⁹⁰ This “purpose” brought the teachers conduct within the scope of prohibited strike activity under PERA. At the same time, however, the problems in negotiation arguably arose because of the public school employer’s alleged refusal to bargain in good faith.⁹¹ The strike, therefore, was also potentially in response to the public school employer’s unfair labor practices. Accordingly, the Court undertook an in-depth analysis of the potential impact of an unfair labor practice strike on a public employer’s right to terminate a “striking” employee under PERA.

The Court proceeded by recognizing that Michigan labor relations acts were modeled after the NLRA.⁹² The Court then noted:

[f]ederal cases recognize an employer’s right to hire replacements for strikers. “Economic strikers” have limited rights of reinstatement. “Unfair labor practice” strikers have an absolute right to reinstatement—unless guilty of misconduct—even if the employer has hired permanent replacements.⁹³

The Court also stated that “[a]lthough a strike begins as an economic strike, if it is determined that the employer engaged in an unfair labor practice, the strike may be held to be an

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *Id.* at 629.

⁸⁹ *Id.* at 632.

⁹⁰ MICH. COMP. LAWS § 423.202 (1970).

⁹¹ *See Rockwell*, 393 Mich. at 627.

⁹² *See Rockwell*, 393 Mich. at 635-36; 29 U.S.C. 151-69 (1994). *See also supra* Part I.

⁹³ *Rockwell*, 393 Mich. at 636-37.

unfair labor practice strike and the striking employees entitled to reinstatement.”⁹⁴ In this situation, however, even though the strike would be considered an unfair labor practice strike, the strike would *also* be taken for the purpose of coercing a change in the conditions of employment—expressly prohibited under PERA. This explains part V of the Court’s opinion, where the Court states:

The union filed an unfair labor practice charge with the MERC which has not been considered on its merits.⁹⁵ Its amended charge, filed after the December 30, 1974 discharge of the teachers, asserts that ‘[a]ny interruptions in the performance of teaching duties by teachers in such district have been directly provoked and instigated by the unfair labor practices of respondent employer.’

If MERC should determine that the employing school district committed an unfair labor practice, MERC *may* despite the *illegality* of the teachers’ strike, order reinstatement.⁹⁶

These passages read together could indicate that under PERA, unfair labor practice strikes are illegal, and only differ from economic strikes to the extent that a striking employee seeks reinstatement. But in every situation presented to the Court, even where the strike was “instigated by the unfair labor practices of the . . . employer,”⁹⁷ the work stoppage was taken for the purpose of, at least partly, coercing a change in the working conditions of the striking employees. This conduct is expressly prohibited under PERA. Recall the illustration of the 1965 amendments:

⁹⁴ *Id.* at 637.


⁹⁵ Eventually, the unfair labor practice charge was dismissed. *See* *In re: Crestwood School District Board of Education and Crestwood Education Association*, 1975 MERC Lab. Op. 608. “At the conclusion of those hearings, Judge Sperka found that there had been no unfair labor practices committed by the school board.” *Crestwood Education Ass’n v. Employment Relations Comm’n*, 71 Mich. App. 347; 248 N.W.2d 266 (1976).

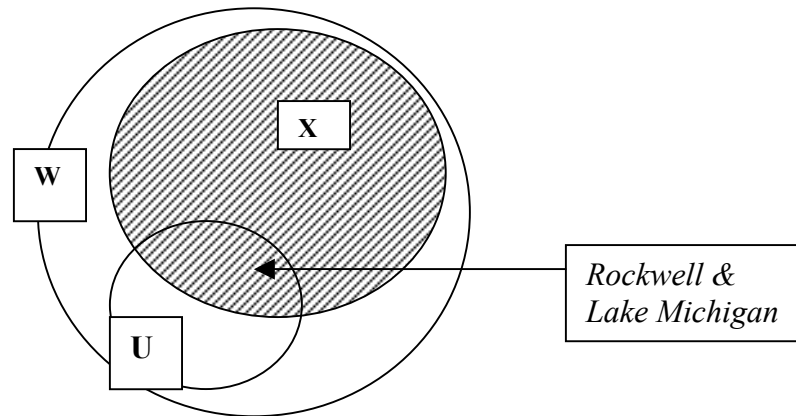
⁹⁶ *Rockwell*, 393 Mich. at 638-39 (emphasis added).

⁹⁷ *Id.*

1965 PERA Amendments

Circle W: all work stoppages
Circle X: work stoppages for the purpose of influencing a change in the conditions of employment
Circle U: work stoppages to protest UNFLP

 Conduct *defined as a strike and deemed a strike*



Under this diagram, **W** represents every work stoppage, and **X** represents work stoppages for the purpose of coercing a change in the conditions of employment—which we already know is prohibited under PERA. However, if **U** represents work stoppages for the purpose of responding to unfair labor practices by a public employer, then the diagram illustrates that although some unfair labor practice strikes will also be economic strikes and therefore prohibited by PERA, unfair labor practice strikes may be taken for the *sole* purpose of protesting an unfair labor practice and therefore *not* prohibited by PERA. Furthermore, because the teachers in *Rockwell* admittedly struck for the purpose of coercing a change in the conditions of

employment,⁹⁸ the Court’s discussion of illegal unfair labor practice strikes is limited to strikes that are also economic strikes.⁹⁹

The limitation of illegal strikes to strikes that are also economic strikes is important to the public employee because of the limitation it imposes on the public employer’s ability to terminate “striking” employees.

[In the private sector,] . . . an economic strike is protected concerted activity . . . [and] it is an unfair labor practice for a private employer to discharge an employee . . . before the employee has been replaced.

. . .

However, in contrast with [the private sector], the PERA prohibits strikes in public employment; public employment strikes, therefore, are not protected “lawful concerted [activity]” . . . within the meaning of § 9 of the PERA.¹⁰⁰

Therefore, if an unfair labor practice strike is not prohibited by PERA, then it *is* protected “lawful concerted activity” and termination of a striking employee prior to replacement would constitute an unfair labor practice by the employer.

Rockwell is important because it distinguished between unfair labor practice strikes and economic strikes and furthers the NLRA’s “balance of power” goal in doing so. The legality of an unfair labor practice strike would justify even more application of NLRA case law on the subject, but the “legality” of such a strike was at best an “uncertainty.”

The Michigan Court of Appeals had addressed the unfair labor practice strike issue six months earlier in *Warren Education Ass’n v. Adams*.¹⁰¹ In *Warren Education*, public school

⁹⁸ See *supra* note 90 and accompanying text.

⁹⁹ This reasoning is consistent with the Sixth Circuit’s decision in *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091 (6th Cir. 1975), issued three months after the Supreme Court’s *Rockwell* decision. In *Lake Michigan*, the Sixth Circuit stated that although “PERA could be interpreted as prohibiting only economic strikes, not work stoppages in protest of an unfair labor practice committed by the employer . . . *Rockwell* makes it clear that a strike by public employees is illegal even though the employer has committed an unfair labor practice.” *Lake Michigan*, 518 F.2d at 1098-99. But this statement must be read in context. In *Lake Michigan*, as in *Rockwell*, the teachers went on strike in order to effect a change in employment conditions, and subsequently claimed that the strike was precipitated by the employer’s unfair labor practice. See *Lake Michigan*, 518 F.2d at 1092-93. Thus, the strike by the faculty in *Lake Michigan* was illegal, even if the employer had committed unfair labor practices, because it was taken initially for an illegal purpose.

¹⁰⁰ *Rockwell*, 393 Mich. at 637-38.

teachers had gone on strike in the Warren Consolidated School District in response to the unilateral implementation of “interim operating regulations” by the School District following the expiration of the collective bargaining agreement *and* in order to pressure the School District to return working conditions to as they stood under the expired contract.¹⁰²

The main issue before the court of appeals had been whether the teachers’ refusal to work constituted a “strike” within the statutory definition of strike in PERA.¹⁰³ The court of appeals had implicitly acknowledged that not every work stoppage by public employees could be considered a strike, but held that this particular work stoppage constituted a strike because “the teachers were seeking a change from the situation as it existed under the interim operating regulations, [and therefore] they were seeking a ‘change in the conditions’ within the meaning of the . . . statute.”¹⁰⁴ This view is consistent with the premise that an economic strike, even if it is also an unfair labor practice strike, is illegal under PERA; while a work stoppage solely in response to an employer’s unfair labor practice is protected concerted activity.

Over a decade later, the Michigan Employment Relations Commission [hereinafter MERC] undertook a similar analysis in *In re Hart Public Schools*¹⁰⁵ and *In re Kent County Education Ass’n*.¹⁰⁶ In both cases, teachers’ unions had authorized strikes during contract negotiations. In *Hart Public Schools*, the union had sent the School Board a letter indicating that

¹⁰¹ 57 Mich. App. 496; 226 N.W.2d 536 (1975).

¹⁰² See *Warren Education Ass’n v. Adams*, 57 Mich. App. 496, 498-99; 226 N.W.2d 536 (1975). “[T]he sole purpose of the strike was to seek reinstatement of the provisions of the previous expired contract which had been deleted or modified by the ‘interim operating regulations.’” *Warren Education Ass’n*, 57 Mich. App. at 498.

¹⁰³ See *id.* at 499.

¹⁰⁴ *Id.* at 500. However, the converse of the court of appeals’ rationale is that if the teachers had withheld their services solely in response to the unilateral implementation of the “interim operating regulations” by the School District and had waited until *after* the School District had returned working conditions to as they stood under the expired contract, then the “strike” could not have been for the purpose of “coercing a change in the conditions . . . of employment” and would not have been a prohibited strike under PERA. Unfortunately, the court of appeals didn’t address this issue specifically. See *id.*

¹⁰⁵ Case No. CU87 I-54, C87 I-204, 1989 M.P.E.R. (L.R.P.) LEXIS 136.

¹⁰⁶ Docket No. CU92 I-51, 1994 M.P.E.R. (L.R.P.) LEXIS 45.

they were empowered with the authority to call a strike. The letter stated that they were so empowered because:

[t]he Association's bargaining team ha[d] been faced with a series of unfair labor practices originating from [the employer's] spokesman at the table. This c[ould] be demonstrated by such actions as:

- (1) Regressive bargaining,
- (2) Imposing additional work hours without a bargaining position,
- (3) Failing to bargain in a sincere and fair manner.

The Association does express its desire to continue and meet and bargain with [the employer's] representatives in an attempt to reach a fair and equitable contract for both parties. However, if the actions of the Board's representatives continue, that the Association's bargaining team will have no other alternative than to impose the job action.¹⁰⁷

Once the employees went on strike, the employer claimed the strike was an unfair labor practice by the union and a violation of PERA.¹⁰⁸ The union defended by claiming that the purpose of the strike was “to publicize unfair labor practices of [the] school district, rather than to induce, influence, or coerce change in conditions or compensation.”¹⁰⁹ However, the MERC rejected the union's argument because the facts did not support the union's contention that the purpose of the strike was merely to publicize unfair labor practices.¹¹⁰

In *Kent County*,¹¹¹ under similar facts, the employer brought an unfair labor practice charge against the union for an allegedly illegal strike.¹¹² According to the employer, the Michigan Supreme Court had rejected the argument that public employee strikes protesting unfair labor practices constituted an exception to the PERA prohibition on strikes in *Rockwell*.¹¹³ In response, the MERC stated:

the [Unions] went on an illegal economic strike to enforce demands for more benefits. This strike was initiated without any concern for the PERA prohibition

¹⁰⁷ *Hart Public Schools*, 1989 M.P.E.R. (L.R.P.) at 20-21.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.* at 3.

¹¹⁰ *See id.* at 24-25.

¹¹¹ 1994 M.P.E.R. (L.R.P.) LEXIS 45.

¹¹² *See Kent County*, 1994 M.P.E.R. (L.R.P.) LEXIS 45 at *1.

¹¹³ *See id.* at 13-14.

against any such activity. These Unions have adopted the strike as a regular policy for collective bargaining. PERA's admonition against public strikes, by declaring them illegal, has been ignored by the Unions.¹¹⁴

MERC's unwillingness to address the legality of a pure unfair labor practice strike and its proclivity to consider such a strike an economic strike, and therefore prohibited, should not be taken as an endorsement of the view that, as under the 1947 Hutchinson Act, *all* concerted public employee work stoppages are illegal. But by the beginning of the 1990's, it was undeniable that the MERC, the Michigan Legislature and the Executive were increasingly frustrated with public school employees' unions' willingness to use the strike as an economic weapon, regardless of its illegality, in the collective bargaining process.¹¹⁵ As a sign of the power shift to come, the MERC reversed its longstanding approach to a public employer's ongoing duty to bargain in good faith in the midst of a public employee strike in *Melvindale-Northern Allen Park Public Schools*¹¹⁶ [hereinafter *M-NAP*].

Prior to *M-NAP*, a public employer was under a duty to bargain in good faith even during an ongoing public employee economic strike.¹¹⁷ This approach was consistent with the U.S. Supreme Court's approach to private sector employee strikes under the NLRA.¹¹⁸ In the private sector, however, economic strikes are not prohibited. Furthermore, the NLRB had previously held that an employer's duty to bargain under the NLRA may be suspended where the employees

¹¹⁴ *Id.* at 17-18.

¹¹⁵ *See e.g.*, Letter from John Engler, Governor, State of Michigan, to David Kovac (Nov. 3, 1992) (on file at Michigan Historical Records).

Michigan's Public Employment Relations Act states unequivocally in Section 2 that, "No person holding a position in the public school service shall strike." Yet, year after year, we see teachers unions out at the picket line and out of the classroom in direct violation of the law. Unfortunately, my ability to enforce this law is limited.

Id. at 1.

¹¹⁶ 1992 MERC Lab Op. 400, 410.

¹¹⁷ *See* *Saginaw Twp Bd of Educ. v. Saginaw Twp Educ. Ass'n*, 1970 MERC Lab Op 127.

¹¹⁸ *See supra* notes 21-22 and accompanying text.

strike in violation of a no-strike clause.¹¹⁹ In *M-NAP*, accordingly, the MERC reversed twenty-years of case law and found that a public employer acts in good faith when it “temporarily and ‘reasonably’ suspends bargaining during the pendency of an illegal strike.”¹²⁰ According to the MERC:

[i]t is . . . the purpose of PERA, like the Hutchinson Act which preceded it, to prohibit public employee strikes. Indeed . . . the preamble suggests that prohibition of strikes is a primary purpose of the Act. We agree . . . that one of the purposes of the statute is to preserve a “balance” between public employers and public employees and their representatives. However, unlike bargaining under the NLRA, the system of collective bargaining contemplated by PERA is founded on the premise that public employees will not strike. In return for depriving employees of the right to strike, essential under the NLRA, the Legislature . . . provided employees with a fact finding procedure to help resolve disputes. Moreover, because of the strike prohibition, the Commission and the Courts have construed Section 15 of PERA more expansively than its NLRA counterparts to require mandatory bargaining on a wider range of subjects.¹²¹

The MERC, however, refused to decide whether a public employer’s duty to bargain is also suspended during an unfair labor practice strike.¹²² But if the employer’s duty to bargain is suspended because of their employees’ participation in an illegal strike, the *legality* of an unfair labor practice strike would suggest that the duty to bargain would continue during such a strike, unless of course the employer could show the object of the strike was also to coerce a change in the terms and conditions of employment.

¹¹⁹ See *United Electrical, Radio, & Machine Workers of America v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955). See also *supra* note 4 and accompanying text.

¹²⁰ *M-NAP*, 1995 M.P.E.R. (L.R.P.)33, *7.

¹²¹ *Id.* at *9. The MERC published its decision explaining its rationale on January 18, 1995. Although part of its rationale explained that the MERC and the courts construe “PERA more expansively . . . to require mandatory bargaining on a wider range of subjects . . .” so as to justify its decision, 1994 PA 112 had already passed the legislature and it was clear that it would greatly *restrict* PERA and require bargaining on a *narrower* range of subjects for public school teachers.

¹²² *Id.* at *13 (citing *Mastro Plastics Corp. v. NLRB*, 214 F.2d 462 (2nd Cir. 1954)). *Cf.*, *supra* notes 32-37 and accompanying text. Part of the MERC’s reasoning relied upon the premise that under the NLRA, a strike in violation of a no-strike clause suspends the employer’s duty to bargain in good faith. See *supra* note 119 and accompanying text. In *Mastro Plastics*, however, an unfair labor practice strike was not considered a “strike” for purposes of a no-strike clause. The same logic would apply here.

The failure of either the Judiciary or the MERC to rule on the legality of an unfair labor practice strike created uncertainty when either labor or management were planning for a strike. For if a strike were ever deemed an unfair labor practice strike, neither labor nor management could accurately predict the cost of the strike to their side. To a certain extent, this uncertainty was itself a balancing factor in the power struggle between labor and management. Undoubtedly though, the MERC's decision in *M-NAP* strengthened the bargaining position of public employers and worsened the bargaining position of public employees by placing an emphasis on PERA's prohibition on strikes. This change in emphasis was simultaneously occurring in the Legislature.

C. 1994 and into the Future

1. 1994 Public Act 112

In 1994, the Michigan Legislature made significant changes to the Public Employees Relations Act¹²³ and for the first time, PERA distinguished between different types of public employees. The Legislature altered the definition of strike under PERA, imposed stricter enforcement measures to deter future strikes, fundamentally altered the balance of power between employee and employer, and drastically impaired a union's ability to maintain consistency in the terms and conditions of employment between different bargaining units throughout the state. All of these changes were addressed specifically to those public employees that had proven to be most troublesome—public school teachers.

In regards to all public employees except public school employees, PERA retained the 1965 definition of strike activity and the 1965 definition of conduct deemed to be strike

¹²³ Act of May 2, 1994, 1994 Public Act 112 [hereinafter 1994 PERA Amendments].


activity.¹²⁴ However, “[f]or employees of a public school employer, strike *also include[ed]* an action . . . taken for the purpose of protesting or responding to an act alleged or determined to be an unfair labor practice committed by the public school employer.”¹²⁵ This definition of strike was also used to define the conduct of public school employees that would be considered “strike activity.”¹²⁶ The effect of this definition was to prohibit a type of work stoppage for public school employees previously not statutorily prohibited. To illustrate again:


¹²⁴ 1994 PERA Amendments §§ 1 & 7. A strike for non-public school public employees is defined and deemed as a work stoppage “for the purpose of influencing or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment.” §§ 1 & 7.


¹²⁵ 1994 PERA Amendments § 1 (emphasis added).

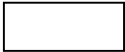
¹²⁶ 1994 PERA Amendments § 7.

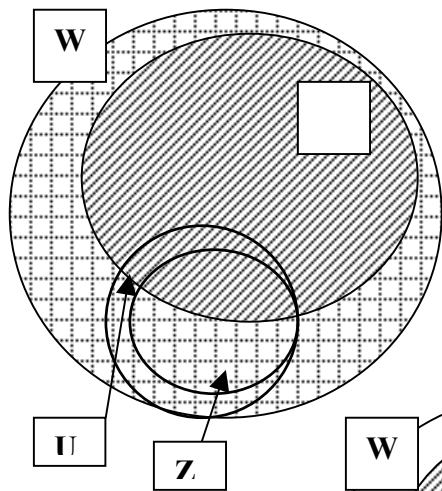
Circle W: all work stoppages (concerted)
Circle X: work stoppages for the purpose of influencing a change in the conditions of employment
Circle U: UNFLP strikes—all public employees
Circle Z: UNFLP strikes—public school employees

 Conduct *defined* as a strike *and deemed* (or considered) a strike for all public employees

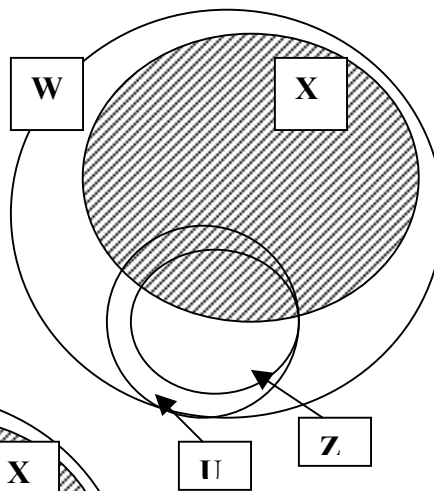
 Conduct defined as a strike and deemed (or considered) a strike for only public school employees

 Conduct only *deemed* strike activity

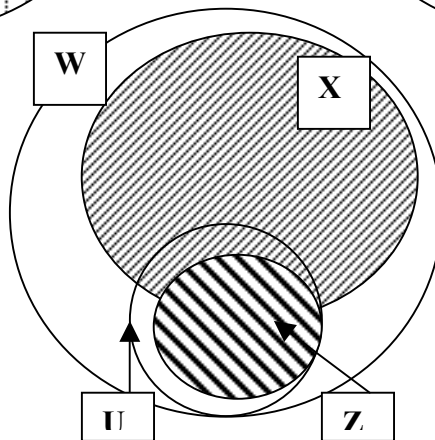
 Conduct not expressly prohibited under the Act



1947 Hutchinson Act



1965 PERA amendments



1994 Amendments

In addition to the expansion of the definition of strike activity in relation to public school employees, the 1994 amendments strengthened the enforcement measures available to public school employers in case of a public school employee strike.¹²⁷ These measures harkened back to the Hutchinson Act enforcement provisions repealed by PERA in 1965.¹²⁸ The 1994 Amendments imposed mandatory fines on public school employees if they were found to have participated in a prohibited strike,¹²⁹ imposed mandatory fines on the bargaining representative of the striking public school employees of \$5,000.00 per day *regardless* of the bargaining representative's participation in or encouragement of the prohibited strike,¹³⁰ and, if requested by a public school employer, required a court to issue an injunction enjoining a strike by public school employees "if the court [found] that a strike . . . had occurred, *without* regard to the existence of other remedies, demonstration of irreparable harm, or other facts."¹³¹

In addition to stricter enforcement measures, the 1994 amendments tried to decrease strikes by severely impacting the bargaining leverage of public school employees in other ways. One such method was to remove from the bargaining table nine areas where bargaining had been particularly contentious.¹³² These nine areas, though directly related to terms and conditions of

¹²⁷ See *infra* notes 129-31 and accompanying text.

¹²⁸ See §§ 4 & 8 1947 Act; 1965 amendments.

¹²⁹ See 1994 PERA Amendments § 4.

¹³⁰ See 1994 PERA Amendments § 4.

¹³¹ 1994 PERA Amendments § 10 (emphasis added).

¹³² See MICH. COMP. LAWS 423.215(3) (West 2001).

(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

- (a) Who is or will be the policyholder of an employee group insurance benefit. . . .
- (b) Establishment of the starting day for the school year and the amount of pupil contact time required to receive full state school aid . . .
- (c) Composition of site-based decision-making bodies established . . .
- (d) The decision of whether or not to provide or allow interdistrict or intradistrict open enrollment opportunity . . .
- (e) The decision of whether or not to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies . . . or the granting of leave to a public school employee to participate in a public school academy.

employment, were no longer mandatory subjects of bargaining. These subjects were now prohibited and bilateral negotiation on these topics was replaced with unilateral implementation by the public school employer.¹³³ The amendments also eliminated the union's power to veto or require ratification of a collective bargaining agreement reached between a public school employer and bargaining unit members.¹³⁴ This destroyed the union's ability to maintain consistency in demands between different public school districts and bargaining units throughout the state.

The expansion of the definition of strike; the stricter enforcement measures; the removal of the nine subjects of collective bargaining from the table; and the elimination of union veto power demonstrate a departure from not only thirty years of case-law, but also a departure from the central tenet of collective bargaining: maintaining the balance of power between labor and management. The response of the judiciary to these changes could determine the future of collective bargaining for public employees.

2. Case Law in Response to 1994 PERA Amendments

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- (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract; or the identity of the third party; or the impact of the contract on individual employees or the bargaining unit.
 - (g) The use of volunteers in providing services at its schools.
 - (h) Decisions concerning use of experimental or pilot programs and staffing of [such] . . . programs and decisions concerning use of technology . . . and staffing to provide the technology, or the impact of these decisions on individual employees or the bargaining unit.
 - (i) Any compensation or additional work assignment intended to reimburse an employee for or allow an employee to recover any monetary penalty imposed under this act.

Id.

¹³³ “The matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purpose of this act, are within the sole authority of the public school employer to decide.” MICH. COMP. LAWS 423.215(4) (West 2001).

¹³⁴ *See* MICH. COMP. LAWS 423.217(1) (West 2001).

The effect of Section 17 is to decapitate school employee unions. Both “bargaining representatives” and “education associations” are prohibited—for the first time in the history of public employee collective bargaining in Michigan, and exclusively as to school employees—from effective involvement in their own collective bargaining.

Almost immediately after the 1994 amendments were passed, the Supreme Court addressed a constitutional challenge in *Michigan State AFL-CIO v. Employment Relations Comm'n*.¹³⁵ In *Michigan State AFL-CIO*, the Michigan Education Association and the Michigan State AFL-CIO brought suit challenging the constitutionality of the 1994 amendments.¹³⁶

In circuit court, the plaintiffs in *Michigan State AFL-CIO*, on motion for summary disposition, had made multiple challenges to PERA's new treatment of strike activity.¹³⁷ The plaintiffs had challenged the provisions of the PERA amendments fining the collective bargaining representative for strikes by represented public school employees;¹³⁸ requiring the courts to issue a mandatory injunction during an illegal strike, regardless of the equities of the situation;¹³⁹ and prohibiting unfair labor practice strikes.¹⁴⁰ The circuit court had granted the motion with respect to PERA's imposition of fines against collective bargaining representatives and with respect to PERA's treatment of mandatory injunctions.¹⁴¹ According to the circuit judge, the fines against the collective bargaining representative violated due process and the injunction provision violated the separation of powers doctrine.¹⁴² These rulings were not challenged on appeal and have not been addressed by the Supreme Court.

With respect to PERA's prohibition of unfair labor practice strikes, however, the circuit court had denied the plaintiffs' motion and upheld the validity of the amendments.¹⁴³ The court

Andrew Nickelhoff, *Marching Headlong Into the Past: 1994 PA 112 and the Erosion of School Employee Bargaining Rights*, 74 Mich. B.J. 1186, 1188 (1995).

¹³⁵ 453 Mich. 362; 551 N.W.2d 165 (1996).

¹³⁶ See *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 367; N.W.2d 165 (1996).

¹³⁷ I do not address the plaintiffs' challenge to the definition of "strike" grounded in the potential ambiguity between a strike defined as requiring "concerted activity" and the possibility that the amendments allowed a "strike" to be conducted by a single public employee.

¹³⁸ See *Michigan State AFL-CIO*, 453 Mich. at 367. See also 1994 PERA Amendments § 2(a)(4).

¹³⁹ See *Michigan State AFL-CIO*, 453 Mich. at 367-68. See also 1994 PERA Amendments § 2a(10).

¹⁴⁰ See *Michigan State AFL-CIO*, 453 Mich. at 382-83. See also 1994 PERA Amendments §§ 1(1)(i) & 6(1).

¹⁴¹ See *Michigan State AFL-CIO*, 453 Mich. at 367-68.

¹⁴² See *id.* See also *City of Holland*, 380 Mich. at 314; *supra* notes 75-82 and accompanying text.

¹⁴³ See *Michigan State AFL-CIO*, 453 Mich. at 267.

of appeals had affirmed.¹⁴⁴ Before the Michigan Supreme Court, plaintiffs argued that this prohibition violated their First Amendment free speech rights.¹⁴⁵ To begin its analysis, the Court clarified that:

[Under PERA,] a strike is defined in relation to the motivation for the work stoppage. As applied to public school employees, the list of prohibited motivations includes protesting unfair labor practices.¹⁴⁶

The Court then noted that PERA only prohibited the *conduct* of striking, using the motivation of the “striker” as the determinant of whether or not the public employee was actually on strike.¹⁴⁷ Therefore, according to the Court, in contrast to a “prohibit[ion] [on] picketing on the basis of the motivation for the picketing, . . . [w]ithholding services alone does not communicate a sufficiently distinctive message”¹⁴⁸ to bring such activity within the protection of the First Amendment.¹⁴⁹ The Court upheld PERA’s prohibition of unfair labor practice strikes by public school teachers, but the Court reiterated its treatment of unfair labor strikes espoused in *Rockwell*.¹⁵⁰ According to the Court:

Rockwell held that the MERC may reinstate teachers who were engaged in an unfair labor practice strike if reinstatement best effectuated the policies of the PERA. However, this Court decided *Rockwell* on the basis of a separate section of the PERA not amended by 1994 P.A. 112. Accordingly, *we conclude that Rockwell is unaltered by Act 112*.¹⁵¹

Rockwell had dealt with the MERC’s ability to reinstate terminated employees pursuant to section 16 of PERA. But while the Supreme Court in Michigan State AFL-CIO claimed that

¹⁴⁴ See Michigan State AFL-CIO v. Michigan Employment Relations Comm’n, 212 Mich. App. 472; 538 N.W.2d 433 (1995).

¹⁴⁵ See Michigan State AFL-CIO, 453 Mich. at 382-83.

¹⁴⁶ *Id.* at 383.

¹⁴⁷ See *id.* at 383.

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* But see County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass’n, 38 Cal.3d 564; 699 P.2d 835 (1985) (finding that California’s longstanding prohibition on public-employee strikes under the California common law arbitrary and suggesting that all workers, both public and private, have the constitutional right to withhold labor incident to the right of association of federal and state constitutions such that the exercise of the right to strike could not be infringed upon absent a compelling justification).

¹⁵⁰ See Michigan State AFL-CIO, 453 Mich. at 384 n.13. See also *supra* notes 83-96 and accompanying text.

Rockwell was unaltered by the 1994 PERA Amendments, the illegality of a public school employee unfair labor practice strikes all but eliminates the applicability of NLRA case law on the subject.

Public employment law appears to be coming full circle. From 1947-1965 public employees had very little voice in the terms and conditions of their employment. In 1965 the Michigan Legislature provided public employees with such a voice, but the use of this voice by public school teachers caused the Legislature to try and take it away with the 1994 PERA Amendments. Under the NLRA, collective bargaining works because Congress, the NLRB, and the courts consistently work to maintain a balance of power between labor and management. In Michigan, however, while the MERC and the state courts have arguably tried to maintain this balance, as a matter of public policy, the Michigan Legislature has unnecessarily worked to disrupt it.

III. PUBLIC POLICY

A. Approaches to the Public Employee Labor Relations

In the public sector, employment relations acts are torn between two potentially polar opposite objectives: (1) to prevent strikes by public employees and (2) to protect the rights of public employees to bargain collectively. Several approaches have been suggested to address the conflict between these two legislative goals: the punitive approach, a recognition of a limited right to strike, the aid to bargaining approach, and the unfair labor practice proceeding.¹⁵² In addition, there are three ways the terms and conditions of employment can be set in a public employee setting. The terms and conditions of employment may be unilaterally set by the employer, bilaterally set through collective bargaining, or set by a neutral third party through

¹⁵¹ *Michigan State AFL-CIO*, 453 Mich. at 384 n.13.

arbitration.¹⁵³ Over the years, Michigan has incorporated some elements of each of these approaches to public sector labor relations as a means of supporting one or more methods of implementing the terms and conditions of employment.

The punitive approach operates under the presumption that “imposition of penalties for striking will deter future strikes.”¹⁵⁴ The Hutchinson Act’s penalties are an example of this model,¹⁵⁵ as are the 1994 PERA Amendments.¹⁵⁶ Strict application of the punitive approach is criticized because many feel that punishment of strikers, rather than deterring future strikes, raises strikers to “martyr status” and solidifies labor against the strike prohibition—causing disrespect for the law by encouraging public employees to flout the law in order to achieve their contract demands.¹⁵⁷ For example, in response to proposed changes to PERA in the mid-1970’s, the Michigan Federation of Teachers issued a position statement which read in part:

Whereas, the right of collective bargaining, including the right to strike is a basic right of all workers, and
Whereas, any attack on the right of collective bargaining is an attack on all unions, . . . THEREFORE BE IT RESOLVED: that the Michigan Federation of Teachers will join with other unions to initiate a mass campaign against this anti-labor, anti-union legislation¹⁵⁸

¹⁵² See Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 269 (1969).

¹⁵³ See Theodore W. Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 937-38 (1969).

¹⁵⁴ Kheel, *supra* note 153, at 937.

¹⁵⁵ See *supra* notes 49-51 and accompanying text.

¹⁵⁶ See *supra* Part II.C.1.

¹⁵⁷ See Comment, *supra* note 152 at 273.

A stringently punitive approach may be functional as long as employees are unorganized and jobs are scarce. But as the relative affluence and strength of employee organizations increase, the obvious inequity of the purely punitive approach may encourage public employee strikes rather than prevent them.

Id. at 271. The failure of the Taylor law in New York in the mid-1960’s demonstrates the inadequacy of a strict punitive approach.. See Kheel, *supra* note 153 at 936 (“the Taylor Law . . . made subversive a form of conduct society endorses for private workers . . . [i]t encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess . . . [i]t made the march to jail a martyr’s procession and a badge of honor for union leaders . . . [i]t hardened positions . . . [and] it did not . . . work as mechanism for resolving conflicts in public employment”).

¹⁵⁸ Substitute for Resolutions # 4 and # 8 of the Michigan Federation of Teachers, 40th Annual Convention (May 3-4, 1974) (on file with Michigan Historical Records).

The Michigan Legislature’s increasing reliance on the punitive approach strengthens the public employer’s ability to unilaterally implement the terms and conditions of employment. As stated by Lawrence Reed of the conservative Mackinac Center for Public Policy “PA 112 make[s] it easier for management to manage and for teachers to teach,” regardless of the impact this has on a public school employee’s ability to affect the terms and conditions of their employment.¹⁵⁹

The limited right to strike approach, however, attempts to maintain a balance in power between labor and management and to allow, as much as possible, the bilateral implementation of terms and conditions of employment. The limited right to strike, however, accepts the proposition that “the simple right of representation, even when coupled with a duty to bargain, is not enough to achieve a balance of power.”¹⁶⁰ Those against the limited right to strike argue that such a right would skew the bargaining leverage drastically in favor of labor because of the political nature of public employment not present in the private sector.¹⁶¹ To the extent the Supreme Court’s *City of Holland* decision prevented public employers and the legislature from enjoining public school strikes absent a showing of irreparable injury, *City of Holland* could be interpreted as providing public employees with the *ability* to strike.¹⁶²

Under the aid to bargaining approach, different techniques such as mediation, fact-finding, and arbitration are utilized in an attempt to settle disputes between labor and

¹⁵⁹ Lawrence W. Reed, *A New Day for Michigan Schools*, MACKINAC CENTER FOR PUBLIC POLICY, at <http://www.mackinac.org/v1995-12> (last visited Nov. 1, 2001).

¹⁶⁰ Comment, *supra* note 152, at 275.

¹⁶¹ *See id.* Whereas a private employer may simply engage in a game of “economical chicken” with striking employees, a public employer must keep public services running, and would therefore be more likely to concede to unreasonable demands by labor. *See also* Lawrence W. Reed, *Michigan’s Teacher Bargaining Law: A Model for Illinois*, A HEARTLAND PERSPECTIVE, at <http://heartland.org/perspectives/reed.htm> (last visited Nov. 1, 2001) (“[t]he crucial difference . . . is that customers are not forced to pay for the product when a private factory is shut down by a strike. When public employees close down a school, however, taxpayers keep paying for the education their children aren’t getting”).

management. Michigan public employment law provides all three of these techniques in one form or another. Fact-finding followed by mediation is available to both public employers and employees upon request¹⁶³ and upon reaching impasse, additional mediation is available to public school employees as long as both parties agree.¹⁶⁴ Mediation, however, though helpful in allowing the parties to see a different perspective and to better evaluate their own positions, is not binding on either party and provides no real method of impasse resolution. Under the aid to bargaining approach, arbitration provides the only true means of impasse resolution. Arbitration, however, is currently only available for labor disputes involving police and fire fighters.¹⁶⁵

Finally, Michigan provides a fact-finding unfair labor practice proceeding (MERC proceeding) with exclusive jurisdiction to decide alleged unfair labor practices.¹⁶⁶ While this deters unfair labor practices by the public employer, the machinery of the unfair labor practice proceeding is too unwieldy and time-consuming to be useful to a union during collective bargaining.¹⁶⁷

In Michigan, then, our approach to public employment law has gone from punitive under the Hutchinson Act, to a mix between the punitive approach (illegality of strikes), a limited “ability” to strike approach (*City of Holland*), and a limited aid to bargaining approach

¹⁶² See *supra* notes 75-82 and accompanying text.

¹⁶³ See MICH. COMP. LAWS ANN. § 423.207 (West 2001) (“the commission forthwith shall mediate the grievance set forth in the petition”).

¹⁶⁴ See MICH. COMP. LAWS ANN. § 423.207a(1) (West 2001) (“[i]n addition to mediation under section 7, if [the parties] . . . mutually agree that an impasse has been reached . . . the parties may agree to . . . additional mediation”). However, if an agreement is not reached, “the public school employer may implement unilaterally its last offer of settlement made before the impasse occurred.” MICH. COMP. LAWS ANN. § 207a(4) (West 2001).

¹⁶⁵ See MICH. COMP. LAWS ANN. §§ 423.231-47 (West 2001). According to section 1 of the Act,

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.

MICH. COMP. LAWS ANN. § 423.231 (West 2001). High morale in other areas of public employment is apparently not requisite to their efficient operation.

¹⁶⁶ See *supra* note 146 and accompanying text.

(mediation, fact-finding, unfair labor practice proceedings, and arbitration for police and fire fighters); and back to the punitive approach (1994 PERA Amendments).

C. The Problem with Michigan's Approach to Public Employee Strikes

Michigan's approach to collective bargaining and employee strikes in the public sector is problematic for at least three reasons: (1) it unduly undermines the stability and equality, and thus the effectiveness of the collective bargaining process for public school employees (and derivatively—all public employees); (2) it unnecessarily prohibits unfair labor practice strikes by public school employees, and (3) it draws a distinction between public school employees and non-public school public employees that could raise concerns in the future.

Michigan's approach to public sector employment undermines the stability and equality and thus effectiveness of collective bargaining for public school employees because it unnecessarily breaks from the approach taken under the NLRA.¹⁶⁸ This is true both with respect to collective bargaining itself and the maintenance of the balance of power.

First, under the NLRA, collective bargaining was intended to both reduce labor disputes and increase wages.¹⁶⁹ Collective bargaining itself worked because it brought the parties together,¹⁷⁰ unions became more responsible with recognition and experience,¹⁷¹ the employee collective was more influential than individual employees,¹⁷² and collective bargaining replaced unilateral implementation with bilateral discussions.¹⁷³ Under the 1994 PERA Amendments, however, unilateral implementation of major public school employee concerns replaced bilateral

¹⁶⁷ See Comment, *supra* note 152, at 288.

¹⁶⁸ See *supra* part I.

¹⁶⁹ See *supra* note 10.

¹⁷⁰ See *supra* note 14.

¹⁷¹ See *supra* note 15.

¹⁷² See *supra* note 16.

¹⁷³ See *supra* note 17.

discussion,¹⁷⁴ the strength of the employee collective was greatly diminished by the “decapitation” of the public school employees’ unions¹⁷⁵ (which logically would also have an adverse effect on the “maturity” of the now diverse and segregated unions), and since M-NAP, the public school employer was no longer under an obligation to bargain in certain circumstances.¹⁷⁶ Taken together, Michigan law has eroded the basis upon which the collective bargaining process relies in order to work. This is especially worrisome because of Michigan’s failure to maintain a balance of power between labor and management in the area of work stoppages.

In order to maintain a balance of power under the NLRA, the judiciary has differentiated between unfair labor practice strikes and economic strikes.¹⁷⁷ This distinction helped deter unfair labor practices by the employer by not rewarding such conduct and thus helped maintain the balance of power.¹⁷⁸ For public school employees under PERA, however, the distinction is no longer present, and the prohibition of unfair labor practice strikes and economic strikes rewards the public school employer’s attempts to destroy the power of the union through unfair labor practices.¹⁷⁹

Although these changes are of immediate concern to public school employees, this is so because, historically, public school employees were the public employees most likely to use economic weapons in order to coerce a change in the terms and conditions of employment. If other groups of public employees, such as public transit employees, are considering the use of economic weapons in order to coerce a change in the terms and conditions of employment, this activity could be chilled by Michigan’s reaction to such public school employee activity.

¹⁷⁴ See *supra* notes 132-33 and accompanying text.

¹⁷⁵ See *supra* note 134 and accompanying text.

¹⁷⁶ See *supra* notes 117-22 and accompanying text.

¹⁷⁷ See *supra* notes 23-40 and accompanying text.

Second, Michigan's prohibition of unfair labor practice strikes is unnecessary. The Michigan legislature and the MERC became disgusted with the public school employees' unions' use of the unfair labor practice strike as an attempt to legitimize an economic strike in the face of an outright prohibition of economic strikes and arguable allowance of unfair labor practice strikes.¹⁸⁰ PERA, however, already contained a prohibition on the use economic strikes¹⁸¹ and the use of an unfair labor practice strike to legitimize an economic strike would still be a work stoppage taken, at least in part, to coerce a change in the conditions of employment.¹⁸² For the Michigan legislature, however, the uncertainty inherent in the determination of a strike object was too detrimental to the public school employer's interest in prohibiting economic strikes to allow public school employees to ever stop working in order to protest the unfair labor practices of their employer. This uncertainty, however, was one of the last vestiges of power balancing that promoted successful collective bargaining and deterred public school employer unfair labor practices.¹⁸³

Lastly, Michigan's approach to public employment law raises concerns for the future because of its distinction between public school employees and non-public school public employees. For example, the 1994 PERA Amendments come down hard on public school employees. But for non-public school employees, the dangers of public school employment strikes are still present for other public employees. A ten-day public garbage disposal employee unfair labor practice strike would arguably be much more detrimental to the health of a community than a ten-day strike, yet such a work stoppage is not prohibited under PERA.

¹⁷⁸ See *supra* note 28 and accompanying text.

¹⁷⁹ See *supra* notes 27 and 125 and accompanying text.

¹⁸⁰ See *supra* notes 121 and 125-26 and accompanying text.

¹⁸¹ See PERA § 2.

¹⁸² See *supra* notes 98-121 and accompanying text.

¹⁸³ See *supra* notes 177-79 and accompanying text.

In *City of Detroit*, the Michigan Supreme Court justified the prohibition of public employee strikes because of the importance of rendering essential government services,¹⁸⁴ the absence of a right to strike under the common law,¹⁸⁵ and the sovereignty principle.¹⁸⁶ As a matter of policy, the prohibition of unfair labor practice strikes doesn't meet the "importance of rendering essential government services" rationale for two reasons. First, other public-sector employees who perform public services just as important to the health and safety of the community as public-school employees, yet there is no outright prohibition of unfair labor practice strikes in their case. Second, in the field of education, there has been a significant push by the proponents of the 1994 PERA Amendments for an increase in *private*-school facilities—arguing that the "undue" power exerted by the teacher unions in Michigan is due to the lack of competition from the private sector.¹⁸⁷ Yet this argument is inconsistent with the "essential government services" argument. In the private sector, PERA would not prohibit private-school employees from organizing a union, forcing collective bargaining, and using the *economic* strike to force concessions from the private school employer. If a teacher strike, regardless of its object, is so dangerous to the welfare of our children, why encourage potential strikes through privatization? Michigan policy-makers have used the public's emotional response to teacher strikes to slowly implement their own policies regardless of their announced intentions.

Undoubtedly, the Michigan Legislature's imposition of the 1994 PERA Amendments was mainly because of the third justification posited by the *City of Detroit* Court—the Sovereignty principle. Public school employees dared to challenge a law they felt unjustified¹⁸⁸ and they

¹⁸⁴ See *supra* note 57 and accompanying text.

¹⁸⁵ See *supra* note 58 and accompanying text.

¹⁸⁶ See *supra* note 59 and accompanying text.

¹⁸⁷ See Reed, *supra* note 159.

¹⁸⁸ See *supra* note 158 and accompanying text.

were severely punished—not only on a case by case factual basis¹⁸⁹ but also by a near removal of their collective bargaining rights.

CONCLUSION

In conclusion, Michigan law treats public-school employees differently because of this group’s historical proclivity to using economic weapons during collective bargaining. Over time, Michigan has shifted from an apparent “limited right to strike approach”¹⁹⁰ to an adoption of the “punitive approach” and unilateral implementation. However, by paying lip-service to public-employees’ collective bargaining rights and severely punishing those groups of employees that test the limits of the law, Michigan policy has negative implications on the collective bargaining process and public employee relations in general.

In response to the hypothetical posited in the introduction, under the current version of PERA, it seems unlikely, but Michigan law punishes more harshly those public school employees that stop work to prevent an illegal act of the employer (unfair labor practice strike) than those employees that take off work in order to watch a baseball game. This is not how we should treat our public teachers.

¹⁸⁹ See *supra* note 107 and accompanying text.

¹⁹⁰ See *supra* notes 75-82 and accompanying text.