

STATE OF MICHIGAN
COURT OF APPEALS

LOCAL 502, SEIU, AFL-CIO,
Plaintiff-Appellee,

UNPUBLISHED
September 5, 2006

v

COUNTY OF WAYNE,
Defendant-Appellant.

No. 260202
Wayne Circuit Court
LC No. 04-434618-CL

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant, County of Wayne (“Wayne County”), appeals the trial court’s order that granted a preliminary injunction to the plaintiff union, Local 502, SEIU, AFL-CIO (“the union”) and denied Wayne County’s motion to disqualify the union’s counsel. We affirm in part and vacate in part.

I. Facts and Procedural History

As the recognized bargaining unit, the union represents all non-supervisory law enforcement employees of the Wayne County Sheriff’s Department and the Wayne County Airport Police. The union asserts that Wayne County violated the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*, when it failed to bargain before it unilaterally changed a term or condition of employment. The parties agree that, at all relevant times, a collective bargaining agreement (CBA) was in effect between the parties. Article 7 of the CBA states that certain top union officers could be released from their regular work assignments in order to conduct union business during regular working hours. The CBA also provided similar work release provisions for several lower-level union officials, including chief stewards, alternate stewards, the union recording secretary, and members of the union elections committee.

In June 2001, Wayne County Undersheriff Donald Watts issued a policy directive known as Wayne County Sheriff’s Department Policy No. 9500 (“Policy No. 9500”). Policy No. 9500 provides that union officials who seek leave time pursuant to Article 7 of the CBA are required to follow certain procedures before they depart to conduct union business. Specifically, Policy No. 9500 requires the officials to report to their regular work assignments and affirmatively request leave time by completing and submitting a form entitled “Request for Authorized Leave for Union Business.” The requesting union officials could then be released for union business only upon approval by their supervisors. According to the union, Wayne County had

traditionally released the union president, first vice president, and second vice president on a full-time basis, without requiring them to comply with Policy No. 9500. However, in late 2004, Wayne County began to require that all union officers comply with Policy No. 9500 by reporting to work, requesting leave time in writing, and obtaining permission before departing their job sites to engage in union business.

The union sought a preliminary injunction to restore the status quo while its unfair labor practice charge is pending before the Michigan Employment Relations Commission (MERC). The trial court granted the injunction because it found that the union had established the likelihood of irreparable injury and the likelihood of success on the merits. The court also found that the harm caused to Wayne County by an injunction would be slight, and that a preliminary injunction was in the public interest.

II. Analysis

A. Preliminary Injunction

Wayne County contends that the trial court erred when it issued the preliminary injunction because the union failed to establish irreparable harm or that it would prevail on the merits. We review a trial court's decision to grant or deny a preliminary injunction for an abuse of discretion. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). Further, we will not reverse the court's underlying findings of fact unless they are clearly erroneous. *International Union, UAW v State*, 231 Mich App 549, 551; 587 NW2d 821 (1998).

In cases of alleged unfair labor practices, a party is authorized to seek temporary injunctive relief from the circuit court. MCL 423.216(h). The trial court's decision whether to issue injunctive relief must be based on the traditional equitable procedures for issuing preliminary injunctions. *Michigan Council 25, AFSCME v City of Detroit*, 124 Mich App 791, 793-794; 335 NW2d 695 (1983). Therefore, the trial court must consider several factors, including "the likelihood that the party seeking the injunction will prevail on the merits," and "the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued." *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998).

Here, though the trial court correctly ruled that the union would likely prevail on the merits, the trial court clearly erred when it found that the union established that it would be irreparably harmed if the court failed to issue the preliminary injunction. To obtain a preliminary injunction, a party must make a showing of a *concrete, particularized* irreparable harm to the interests of the party. *Michigan Coalition of State Employee Unions v Michigan Civil Service Com'n*, 465 Mich 212, 225-226; 634 NW2d 692 (2001). For example, a party may establish irreparable harm if the condition "would become irrevocable and beyond the power of MERC to remedy in the absence of an injunction." *UAW Local 6000 v State of Michigan*, 194 Mich App 489, 508; 491 NW2d 855 (1992).

The union submitted affidavits of present and former union officials who stated that Wayne County had not enforced Policy No. 9500 against higher level officials and that the new requirement would interfere with their ability to effectively represent their members. We agree

with Wayne County that, while the union *asserts* that the policy change will result in lost time and a backlog of union business, the union failed to present any evidence that the policy change would, indeed, cause those problems. For example, the union did not present evidence to establish the nature and quantity of daily business that would be adversely effected by the change. Moreover, while the union also claims that the new reporting practice will cause a damaged relationship between Wayne County and the union, it presented no evidence to show how this will occur. While, in our judgment, Policy No. 9500 may well cause significant and irreparable harm if it has a substantial impact on the union officials' ability to conduct the daily business of such a large union, without any evidence to establish the essential element of particularized irreparable harm, the trial court clearly erred when it issued the preliminary injunction. In other words, we must vacate the preliminary injunction simply because the union failed to introduce any proofs to support its contention of irreparable harm in this case.

Moreover, were we to assume that some harm would result from the policy, no evidence was introduced to establish that it would be irreparable. The union asserts that the harm is similar to that in *Van Buren Public School Dist v Wayne Circuit Judge*, 61 Mich App 6; 232 NW2d 278 (1975) and *Detroit v Salaried Physicians Professional Ass'n*, 165 Mich App 142, 145; 418 NW2d 679 (1987). However, in both *Van Buren Public Schools* and *Salaried Physicians*, the employer unilaterally eliminated union workers, replacing them with non-union employees. Such action was tantamount to a unilateral elimination of the union itself. Because there would have been no union left with which to bargain, this Court ruled that injunctive relief was required to guarantee the efficacy of any future MERC bargaining order. Here, Wayne County's action did not eliminate the union or any union jobs. Moreover, no evidence was introduced by affidavit or direct testimony that an eventual MERC order would be insufficient to redress plaintiff's injuries in this case. Again, our decision is mandated by the failure of the union to submit necessary evidence.

The union further contends that a MERC order is not an adequate legal remedy because it is not immediately available. The union maintains that MERC decisions are generally not issued until "years later," and that injunctive relief in this case is therefore "necessary now." We suggested in *Salaried Physicians* and *Van Buren Public Schools* that MERC remedies would be inadequate because they were not immediately available. However, those cases involved unilateral actions that effectively eliminated the bargaining units altogether. Thus, there was a possibility that the terminated union members "would eventually take other positions and might be unable to return," even if the union "ultimately prevailed [on] its unfair labor practice charges." *Salaried Physicians*, *supra* at 152. Accordingly, in those cases, any MERC bargaining order would have been inadequate and devoid of any value.

Again, however, no union positions were eliminated here. All members of the union will continue to hold their positions, and only the workday schedules of the top three union officers will be directly affected by the change. Though alleged, the union simply failed to introduce evidence of the necessity of immediate remedial action. Moreover, though the passage of time in *Van Buren Public Schools* and *Salaried Physicians* rendered the adequacy of a future MERC order increasingly less meaningful, the passage of time here has not been shown to have the same effect. The trial court erred in finding that plaintiff had established the existence of an irreparable injury for which there was no adequate legal remedy. The court abused its discretion

in granting injunctive relief, and the preliminary injunction is vacated. See *Michigan Council 25, AFSCME v Co of Wayne*, 136 Mich App 21, 26; 355 NW2d 624 (1984).¹

B. Motion to Disqualify Counsel

Wayne County also argues that the trial court improperly denied its motion to disqualify the union's counsel. We disagree. We review de novo a decision whether to disqualify counsel on the basis of "ethical norms." *Rymal v Baergen*, 262 Mich App 274, 317; 686 NW2d 241 (2004). We also review de novo the interpretation of the Michigan Rules of Professional Conduct. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44-45; 672 NW2d 884 (2003).

Wayne County asserts that the union's counsel violated Michigan Rule of Professional Conduct (MRPC) 4.2 by contacting the former Wayne County undersheriff and seeking his affidavit for use in this case. Wayne County maintains that the union's counsel should have been disqualified or sanctioned. MRPC provisions are enforceable by the trial court as part of the court's oversight of the ethical conduct of attorneys. *Evans & Luptak v Lizza*, 251 Mich App 187, 193-194; 650 NW2d 364 (2002); see also Michigan Code of Judicial Conduct, Canon 3(B)(3). A trial court may thus take appropriate steps, including disqualification of an attorney, to ensure that the MRPC ethical rules are followed by counsel.

Here, it is undisputed that the union's lawyer did not contact the former undersheriff personally. Instead, the union president contacted the former undersheriff and asked him to submit an affidavit for this case. By its plain language, MRPC 4.2 applies only to "a lawyer." Moreover, as indicated by the comment to MRPC 4.2, the rule *does not* apply to communications between parties. Though the comment to the rule is not authoritative, MRPC 1.0(c), it is nonetheless persuasive. MRPC 4.2 does not prohibit, as here, communications between non-lawyer parties. Further, MRPC 4.2 only prohibits contact with a person who is "represented in the matter." While the former undersheriff was concurrently represented in *other* matters by defense counsel, he was not "represented in the matter" at the time of the allegedly improper contact. The trial court correctly denied Wayne County's motion for disqualification and correctly found that MRPC 4.2 was not implicated.

III. Conclusion

It is a reasonable contention that MERC may hold that Wayne County's promulgation and enforcement of Policy No. 9500 is a unilateral change regarding a mandatory subject of bargaining that may constitute both an unfair labor practice and a breach of the collective

¹ To the extent that defendant asserts error with respect to the remaining factors considered by the trial court, its arguments are abandoned. These matters were not raised in defendant's statement of questions involved, *Grand Rapids Employees Independent Union v City of Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999), and defendant has provided no legal support for these additional assertions, *Schellenberg v Rochester Elks*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

bargaining agreement. It is also plausible that Policy No. 9500 so undermines the union's ability to conduct union business that its enforcement may constitute irreparable harm. The problem with the union's case at the trial court and, therefore on appeal, is the union's failure to support such plausible assertions by introducing evidence to show how this policy would in fact, not just in theory, impact the union. The union's failure to submit proofs on irreparable harm compels the conclusion that the injunction was improvidently granted. Further, for the reasons stated, the trial court correctly denied Wayne County's motion to disqualify the union's counsel.

Affirmed in part and vacated in part.

/s/ Henry William Saad

/s/ Kathleen Jansen