

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

WASHTENAW COUNTY,
Public Employer,

Case Nos. UC09 J-029; UC06 J-032-A

-and-

AFSCME COUNCIL 25, LOCAL 3052,
Labor Organization-Petitioner.

APPEARANCES:

Gallagher & Gallagher P.L.C., by Paul T. Gallagher, for the Public Employer

Miller Cohen P.L.C., by Richard G. Mack, Jr, for the Petitioner

**DECISION AND ORDER ALLOWING WITHDRAWAL OF
PETITION FOR UNIT CLARIFICATION**

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217, this case was assigned to Administrative Law Judge (ALJ) Doyle O'Connor, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Petitions and Positions of the Parties:

On October 13, 2006, a petition for unit clarification was filed by the American Federation of State, County and Municipal Employees, Michigan Council 25 and Local 3052 (the Union, AFSCME, or Petitioner) seeking the inclusion of approximately twenty additional positions in an existing unit of supervisory employees of Washtenaw County (the Employer) and was assigned Case No. UC06 J-032. On February 26, 2008, the Union filed a related petition seeking the inclusion of approximately forty-seven classifications, apparently comprising nearly seventy individual positions. That matter was assigned Case No. UC08 A-007. The petitions in this matter provided a listing of job classifications, but did not include a statement of the reasons for clarification of the unit or the approximate date that each position was either created or substantially changed as required by Rule 143 of the General Rules of the Michigan Employment Relations Commission, 2002 AACCS, R 423.143.

Procedural History:

The Bureau of Employment Relations (BER) elections staff attempted to assist the parties in resolving the matter. In June 2008, after settlement efforts proved to be unsuccessful, the matter was transferred to MAHS for hearing.

On June 30, 2008, the assigned ALJ directed counsel for the parties to provide additional detailed information by August 30, 2008. A hearing was set for October 27, 2008. On August 20, 2008, at Petitioner's request, the deadline to provide additional information was extended to September 15, 2008. At that time, the ALJ directed the Union to provide the information required by Rule 143, including a list of the positions in dispute and the date each position was created.

On August 22, 2008, the Employer provided a position statement in which it asserted that the unit clarification petitions should be dismissed as the petitions improperly sought to include in the unit positions that had long been excluded. The Employer additionally provided documentation from its records that purported to show that a substantial number, if not the majority, of the positions in question were created years prior to the filing of the petitions. On September 26, 2008, the ALJ issued an order directing Petitioner to consider withdrawing its petitions as to any position in existence more than twelve months prior to the filing of a petition and, alternatively, ordering Petitioner to show cause why the petitions should not be dismissed. Petitioner filed a timely response to the order to show cause. On October 27, 2008, the Employer filed a motion to dismiss the unit clarification petitions. The Union did not respond to the Employer's motion to dismiss the petitions.

In a Decision and Order¹ issued February 18, 2009, the Commission dismissed the petitions as to all but one of the listed positions, the WCHO division manager-9015-0003 position. The question of the status of the WCHO division manager-9015-0003 position was assigned Case No. UC06 J-032-A and remanded to the ALJ for hearing. The Commission's decision explained in detail the deficiencies in the petitions and the reasons that an evidentiary hearing was not warranted for any of the positions listed on the petitions other than the WCHO division manager-9015-0003 position. Petitioner filed a motion for reconsideration of our Decision and Order on April 24, 2009. In our Decision and Order Denying Motion for Reconsideration,² we further explained the reasons that the Union's explanations for failing to provide the information required by Rule 143 were insufficient.

In October 2009, the Union filed another unit clarification petition, which was assigned Case No. UC09 J-029, and consolidated with the remanded case UC06 J-032-A. The matters were then referred back to the BER elections staff for further review. The petition was then further amended by AFSCME. By letter dated August 12, 2010, the BER Director advised AFSCME that the amended petition was defective in that it improperly sought review of nine positions that had been addressed in the earlier Commission decision and, with respect to the remaining seven positions, the new petition failed to provide the minimum information required by Rule 143. On September 17, 2010, AFSCME again amended its petition. BER elections staff

¹ *Washtenaw Co*, 22 MPER 24 (2009)

² *Washtenaw Co*, 22 MPER 76 (2009).

conducted a telephone conference on October 19, 2010, yielding an October 21, 2010 report to the parties by the BER elections officer.

The Employer filed a position statement dated February 8, 2011, further detailing its position regarding the multiple disputed positions and providing various documents related to the dispute. When voluntary resolution on the amended position proved impossible, the matter was referred back to the ALJ on October 7, 2011. On October 13, 2011, the ALJ issued a prehearing order directing Petitioner to provide the information required by Commission Rule 143 with respect to the positions listed in the election officer's report and specifically directing Petitioner to address certain issues with respect to each position.

The Union was given three weeks in which to respond to the October 13, 2011 Order and, when it requested more time, was given another three weeks. On October 31, 2011, AFSCME again attempted to amend its petition seeking to place in dispute additional existing positions that had been excluded from its unit. On January 3, 2012, the Union filed Petitioner's Response to Prehearing Order of October 13, 2011. Later on January 3, 2012, the ALJ asked the Employer to attempt to clarify the situation and advised AFSCME that he would not accept the October 31, 2011 proposed filing of an amended petition, as any such petition needed to be filed with MERC and be reviewed and processed by MERC's staff prior to a possible referral to MAHS for adjudication. AFSCME did not file that proposed amended petition with MERC nor move to amend its pending petition before MAHS.

In the interim, AFSCME and the Employer reached agreement on a new January 1, 2012–December 31, 2013 multi-year collective bargaining agreement, which continued in place the pre-existing unit description.

On January 23, 2012, the Employer brought its third Motion to Dismiss in which it also requested that sanctions be imposed against the Union. A pre-trial conference was held on February 3, 2012. At the conference, the Union was given ninety days to respond to the ALJ's October 13, 2011 prehearing order, to the issues raised in the ALJ's January 3, 2012 letter, and to the Employer's third motion to dismiss. On February 3, 2012, the ALJ held a pre-trial conference with counsel, in which he offered the Union the opportunity to respond to the Employer's motion and to indicate how long it needed to fully respond. Petitioner was then given ninety days to respond. On April 23, 2012, the Union requested, and was granted, an additional sixty days in which to respond to the order to show cause and the Employer's motion to dismiss.

The ALJ sent another letter to the parties on June 28, 2012, in which he noted that the Union had yet to respond adequately to his October 13, 2011 order and the Employer's January 23, 2012 motion, and gave the Union until July 9, 2012 to file its response. On July 9, 2012, the Union filed a response.

On August 1, 2012, the Union requested oral argument. The Employer's motion was set for hearing on August 23, 2012. The parties appeared for oral argument on August 23, 2012, on the issue of whether the petition should be dismissed and on the Employer's motion for sanctions.

At oral argument, the Union sought a voluntary dismissal without resolution of the Employer's claim for sanctions. The Employer agreed. On August 24, the Union submitted what appeared to be a written withdrawal of its claims. Based on the apparent mutual voluntary resolution of the dispute, the ALJ issued an order on August 24, 2012, closing the matter.

Several days later, the Union re-asserted its demand that the Employer negotiate over including in the unit a position that had been covered by the recently withdrawn unit clarification petition. The Employer, in response, demanded that the ALJ reschedule its motion for hearing. On August 30, the Employer's counsel raised objections to the dismissal. The ALJ concluded that he had erred by allowing the petition to be withdrawn and vacated his August 24, 2012 order. The case was returned to its former status with the order to show cause and the Employer's motion to dismiss and for sanctions remaining to be resolved.

On November 29, the ALJ sent a letter to both counsel setting the matter for hearing on January 10, 2013, and noting that the record on the motion was closed. On January 10, 2013, oral argument was taken on the Employer's motion and the ALJ issued a bench opinion that included his recommendations to the Commission on the disposition of this matter. The bench opinion concluded with proposing that the Commission clarify the unit by making clear that all of the non-unit positions the Union has tried to secure through these unit clarification petitions are not in the unit and will not be added to it. After the bench opinion was rendered on January 10, 2013, AFSCME requested additional time in which to seek client approval of and to propose a comprehensive settlement of the dispute consistent with the bench opinion. After those efforts failed to resolve the matter, the case was referred back to the Commission for decision in October 2013.

On November 26, 2013, Petitioner filed a motion for dismissal of the petitions seeking resolution of the matter without the imposition of the sanctions proposed in the ALJ's bench opinion. The Employer filed a response in opposition to the motion on December 2, 2013.

Settlement Agreement

On January 13, 2014, the parties reached a settlement in this matter and submitted it to this Commission with a request that we dismiss the unit clarification petitions. The settlement agreement withdraws the unit clarification petitions with prejudice, amends the collective bargaining agreement to clarify the bargaining unit, and provides for sanctions in the event that Petitioner files a new unit clarification petition regarding any position now in existence and/or unsuccessfully pursues a new unit clarification petition regarding any purportedly newly created or changed position.

This settlement brings to a close almost eight years of litigation over the question of whether certain job classifications should be included in the bargaining unit represented by Petitioner. The issues in this case could have, and most likely would have, been resolved within a matter of months had Petitioner provided the factual detail required by Rule 143 in its initial filing. Rule 143, 2002 AACS, R 423.143, sets forth the requirements for unit clarification petitions and provides in relevant part:

(2) A petition for unit clarification shall include at least all of the following information:

...

(c) The position or positions whose unit status petitioner seeks to have clarified.

(d) The clarification sought, and *a statement of the reasons set out in detail, including the approximate date (or dates) the position or positions were created or substantially changed if applicable.*

...

(h) Any other relevant facts. (Emphasis added.)

The details required by Rule 143(2)(d) are critical to determining whether a job classification should be added to a bargaining unit. We see nothing in the record justifying Petitioner's extended delay in either: 1) providing the factual details required for compliance with Rule 143; or 2) dismissing the petition with respect to those positions for which Petitioner lacked facts to justify adding such positions to the unit.

Given the excessive amount of time and resources expended on this case by the Employer, BER, and MAHS, we understand why the Employer has requested, and the ALJ recommended, that sanctions be imposed on Petitioner. We cannot disagree with their reasoning or the appropriateness of sanctions in this case. However, the Court of Appeals has held that we do not have the authority to award sanctions. See *Goolsby v Detroit*, 211 Mich App 214, 224 (1995). Therefore, if we had decided this matter prior to the parties' settlement, we would not have been able to order the sanctions agreed to in the settlement. Nevertheless, the parties have made a lawful agreement to impose sanctions on Petitioner, which we hereby adopt. A copy of the parties' settlement agreement is attached hereto and incorporated herein by reference.

ORDER

The unit clarification petitions in this matter are dismissed with prejudice.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/ _____
Edward D. Callaghan, Commission Chair

/s/ _____
Robert S. LaBrant, Commission Member

/s/ _____
Natalie P. Yaw, Commission Member

Dated: February 14, 2014