

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
EMPLOYMENT RELATIONS COMMISSION

APPROVED MINUTES
REGULAR MEETING OF OCTOBER 10, 2012
LANSING, MICHIGAN

The meeting of the Employment Relations Commission was called to order at 10:10 a.m., by the Commission Chair, Edward D. Callaghan, at MERC's Lansing Office, 1375 S. Washington, Suite 200, and Lansing, Michigan.

Those in attendance: Edward D. Callaghan, Commission Chair; Commissioners Nino E. Green (via telephone conference) and Robert S. LaBrant; Ruthanne Okun, Bureau Director; Lynn Morison, Staff Attorney (via telephone conference); Jim Spalding, Mediation Supervisor; Micki Czerniak, Mediator (via telephone conference); Verna Miller, Departmental Specialist; Nancy Pitt, Executive Secretary (via telephone conference).

Public in Attendance: Patrick Wright, Derk Wilcox and Dan Armstrong (who videotaped the meeting), Mackinac Center for Public Policy; John Canzano, SEIU Health Care Michigan; Chris Klaver, Gongwer and Emily Lawler, MIRS.

MINUTES

It was moved by Commissioner Green and seconded by Commissioner LaBrant to adopt the minutes of the regular MERC meeting of September 11, 2012 as proposed. A vote was called on the motion. Edward D. Callaghan, Aye; Nino E. Green, Aye; Robert S. LaBrant, Aye. The motion passed.

DIRECTOR'S REPORT

The Act 312 and Fact Finding Report was reviewed. The Director provided updates to the Commission. She noted that Awards have been issued in the Flushing Township, Village of Beverly Hills and Saginaw Township Act 312 cases. A total of 52 Act 312 cases and 55 Fact Finding cases were reported as listed on the status report.

The Administrative Law Judge Reports were reviewed. The Director reported on the status of the older cases.

The Event Report was reviewed.

The Representation and Elections Reports were reviewed. The Director provided an update in the City of Detroit/SEMHA and AFSCME case. An attempt is being made to

clarify the bargaining units of the Detroit Water & Sewerage Department employees and non-departmental employees as ordered by Judge Sean Cox of the U.S. District Court.

Denise Hinneburg has volunteered to assist and is ably assisting with the Act 312/Fact Finding billing process following the layoff of Sidney McBride.

The Mediation Reports for the Detroit and Lansing offices were reviewed. The Director and the Mediation Supervisor Jim Spalding are working on improving the report to reflect the actual work performed by the mediators. A draft of the revised report will be provided to the Commission for review in the near future.

The Work Stoppage Report was reviewed. It was reported that the employees have returned to work in the Detroit Water & Sewerage Department/AFSCME work stoppage.

The Appellate Report was reviewed. There are nine MERC-related cases pending before the Michigan Court of Appeals and 2 pending before the Michigan Supreme Court.

ADMINISTRATIVE AGENDA

Unit Clarification, U.S. vs Detroit Water & Sewerage Department

Updates were reported by the Director and by labor mediator, Micki Czerniak on the City of Detroit and its Unit Clarification petitions and the U.S. District Court Order regarding the Detroit Water & Sewerage Department.

The Final Removal Report for Non-Selection of panel members (Act 312 arbitrators, fact finders, and grievance arbitrators) was reviewed by the Commission. The report listed panel members whose name has been assigned to a proposed panel more than 10 times during the past 5 years, 1/1/06-12/31/11, without being selected by the parties. These persons were to be removed from the panel for reasons of non-selection per the Commission's recently-adopted policy. Four of the removals were rescinded after determining their names were sent out to the parties for consideration less than 10 times during the past 5 years. It was moved by Commissioner Green and seconded by Commissioner LaBrant to return Thomas Brookover, J. Michael Guenther, Gregory Saltzman & Michael Wojcik to the fact finding panel. A vote was called. Edward D. Callaghan, Aye; Nino E. Green, Aye; Robert S. LaBrant, Aye. The motion passed.

The request for reconsideration submitted by Grievance Arbitrators Sharon Imes and Jerry Hetrick was considered by the Commission. It was moved by Commissioner Green and seconded by Commissioner LaBrant to deny the requests of Sharon Imes and of Jerry Hetrick for reconsideration of MERC's decision to remove them for non-selection from the Grievance Arbitration panel, noting that they were properly removed for reasons of non-selection. The Commission noted further that a panel member may reapply pursuant to the MERC Application and Removal Policy. A vote was called. Edward D. Callaghan, Aye; Nino E. Green and Robert S. LaBrant, Aye. The motion passed.

The Commission recognized Lansing Mediation Secretary, Milli Kennedy along with Mediation Supervisor Jim Spalding for taking the responsibility to ensure completion of the Hot Issues Report.

The Commission welcomed Verna Miller, who was recently hired as a Departmental Specialist with our agency.

Sidney McBride has been selected to fill the Administrative Law Specialist position.

BER received the highest scores of all LARA agencies in the State of Michigan Employee Engagement Survey.

It was confirmed that the next Commission meeting is tentatively scheduled for Tuesday, November 13, 2012 at 10:00 a.m., in the Commission's office at 3026 W. Grand Boulevard, Suite 2-750, Detroit, Michigan.

DECISIONAL AGENDA

The Commission discussed and decided the following matter:

1. *Blue Water Area Transportation Commission -and- Michigan AFSCME Council 25 and AFSCME Local 1518*, Case No. C08 C-051.

The Commission discussed the following matter:

1. *Michigan Quality Community Care Council -and- SEIU Healthcare Michigan -and- Patricia Haynes and Steven Glossop*, Case Nos. C12 I-183 & CU12 I-042 and C12 I-184 & CU12 I-043.

There was discussion regarding Charging Parties' motion for declaratory ruling and other relief. Commissioner Green stated that there is no basis for a charge as there was no violation of Section 10 of PERA; nor is there a basis for issuance of declaratory relief as the home help providers are not public employees. Commissioner Green suggested that, perhaps, these individuals are in the wrong forum. Commissioner LaBrant asked if a declaratory ruling could be issued by MERC if no administrative rules have been promulgated. He also questioned whether there is any duty on MERC to promulgate rules on declaratory rulings and asked how the declaratory ruling process interfaces with an ALJ's decision and recommended order. Commissioner Green stated that he cannot see how the charge should be assigned to an ALJ in that home help providers are not public employees. He further stated that there is no jurisdiction or appropriate proceedings to challenge an election held in 2005 and that any relief should be sought in Circuit Court.

It was suggested that staff should identify the relevant issues, and the Commission might address those issues at its November meeting. It was noted that, perhaps, public comment will provide the Commissioners with some insight.

OLD BUSINESS

An update was provided by the Director regarding the status of the City of Detroit Act 312 petitions and its Unions.

City of Detroit/POAM (EMT, EMS), Case No. D09 F-0703 – The parties are proceeding to binding arbitration pursuant to Act 312.

City of Detroit/Command Officers, Case No. D11 J-1169 – The parties are proceeding to binding arbitration pursuant to Act 312.

City of Detroit/ATU (DDOT Bus Drivers' Unit), Case No. D09 C-0436 – The Union has asked that the Fact Finding hearing be held in abeyance pending resolution of the ULP. The Director will provide an appropriate response.

Updates were reported by the Director in the cases concerning *City of Detroit/DFFA*, Case No. D09 C-0436 and *City of Detroit/AFSCME Council 25, Local 1023*, Case No. D10 J-1075.

The 2013 Spring Training at Inn of St. John's in Plymouth will be held in April or early May of next year. We are currently considering whether there should be one full day or a day and one-half day of training. The date(s) preferred by most panel members will be selected for the training. More information will be available at the November MERC meeting.

The development of an Annual Report is being reassigned to Departmental Specialist Verna Miller. A rough draft of the table of contents will be shared with the Commissioners for their review and comment at the November meeting.

The Director reported that the Commission of the Blind and other agencies will be contacted regarding audio/web casting of MERC meetings.

NEW BUSINESS

The recent appointment of Frank Waters as LARA Director of Policy & Legislative Affairs was announced. The Director is scheduled to meet with him. He will be provided with the information previously submitted in order to consider re-introduction to the legislature of the Open Meetings Act amendment.

The September Dashboard report was reviewed and discussed. The goal is to maintain and provide information that is most relevant to constituents.

There was discussion regarding the web posting of audits of unions representing public sector employees, PA 53 of 2011. Staff is working with DTMB to ensure that

the web posting project will be completed and that we will be able to receive submissions by March 2013.

PUBLIC COMMENT

There were comments from Patrick Wright and from Derk Wilcox for the Mackinac Center Public Policy regarding the unionization of home health care workers in the *Michigan Quality Community Care Council -and- SEIU Healthcare Michigan* matter.

Mr. Wright stated that there are a number of issues here 1) the declaratory judgment process 2) the doctrine of comity and 3) whether there is a violation of Section 10 of PERA.

First, he noted that the legislature has the right to define who is/is not a “public employee”. At the time of the Petition for Representation in 2005, there already had been attempts to organize these types of employees in other states. In California for example, it was determined that they are not public employees and have no right to unionize. In this case, the public employer tried to consent to the election. Mr. Wright stated that he believed that the Commission has a duty to investigate jurisdiction and not to simply accept the parties’ consent. In this case, the Commission did not do what it is supposed to do. Mr. Wright also cited PA 45 and stated that after it became effective, the home care workers are no longer public employees and the contract extension entered into, therefore, was void.

Commissioner LaBrant cited Judge Edmunds ruling in the U.S. District Court. He asked how does MERC say that it is not bound by her decision and under what theory would we order the return of 6 months of dues. Mr. Wright stated that Judge Edmunds’ ruling is binding on the parties only. There is no claim or issue preclusion and hence, nothing to prevent the Commission from getting involved. Mr. Wright stated that under the doctrine of primary jurisdiction, MERC can and should correct an error made by a previous Commission in 2005.

Commissioner LaBrant stated that he is not convinced that every agency must promulgate rules for issuance of a declaratory ruling. He suggested that the parties brief this issue – whether MERC has a duty to promulgate a process for issuance of declaratory rulings.

Mr. Wright suggested that even if Proposition 4 passes, the represented workers would be required to re-certify as they stopped being public employees in March of this year.

John Canzano representing SEIU Healthcare Michigan stated that he did not come to the meeting prepared to respond to the submission; he also stated that there clearly is a dispute over the facts and applicable law. He cited the pending federal case before U.S. District Judge Edmunds, which ordered that the collective bargaining agreement

must be honored until February of next year. He noted that there is a serious issue of federal/state comity here; therefore, he will be requesting that this matter be stayed pending Sixth Circuit action. He noted that another case is still pending – involving *Gould-Werth*; this involves legality of PA 45, and this issue is now in litigation in federal court. There is also other pending state court action regarding the issue of the immediate effect of the legislation.

Mr. Canzano noted that many employees want MQCCC to continue – he thinks the contract is valid and there was no conflict of interest when the contract was extended. He stated that he wants to present more information on the comity and the November election issues. He asked for consideration by the Commission and no rush to judgment.

The Commission reiterated that it was requesting that staff present a draft of a list of questions (that ultimately will be asked of the parties) at the Commission’s November meeting. The parties will be requested to respond to those questions at a later date.

PENDING LITIGATION (closed session)

The Commission called for a closed session to discuss pending litigation in *Bailey, et al v Callaghan, et al*, Case No. 12-cv-11504, *Alix Gould-Werth et al v Callaghan*, Case No. 12-cv-1700 – both cases pending in the United States District Court. A vote was called on the motion. Edward D. Callaghan, Aye; Nino E. Green, Aye; Robert S. LaBrant, Aye. The motion passed. The Commission proceeded to Closed Session at 11:50 a.m.

The Commission returned to Open Session at 12:01 p.m.

ADJOURNMENT

There being no further business before the Commission at this time, it was moved by Commissioner Green and seconded by Commission LaBrant that the meeting be adjourned at 12:04 p.m. A vote was called on the motion. Edward D. Callaghan, Aye; Nino E. Green, Aye; Robert S. LaBrant, Aye. The motion passed.

