

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

In the Matter of:

BROWNSTOWN TOWNSHIP,
Public Employer,

-and-

MICHIGAN ASSOCIATION OF POLICE,
Labor Organization-Incumbent,

Case No. R06 G-077

-and-

TEAMSTERS, LOCAL 214,
Petitioner.

APPEARANCES:

Cox, Hodgman & Gianmarco, P.C., by John C. Clark, Esq., for Public Employer

Pierce, Duke, Farrell & Tafelski, P.C., by M. Catherine Farrell, Esq., for the Michigan Association of Police

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for Teamsters Local 214

DECISION AND ORDER

This case comes before the Michigan Employment Relations Commission pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212 and MCL 423.213. Based upon the record and briefs filed on or before September 19, 2006, the Commission finds as follows:

The Petition and Background Matters:

The Michigan Association of Police (MAP) represents a unit of all full-time and part-time patrol officers, detectives, dispatchers, and clerical employees in the police department of the Public Employer, Brownstown Township (Employer). On May 31, 2005, MAP filed an unfair labor practice charge against the Employer in Case No. C05 E-116. While that matter was pending, on June 3, 2005, Teamsters Local 214 (Teamsters)

filed a petition for a representation election in Case No. R05 F-065, seeking to represent the patrol officers, detectives, and dispatchers, but not the clerical employees in the police department. In response, MAP requested that the election be blocked by the pending unfair labor practice charge. On July 20, 2005, the Director of the Bureau of Employment Relations (BER) ordered that the election petition be held in abeyance, and the unfair labor practice charge case and the representation case were consolidated.

Administrative Law Judge (ALJ) Julia C. Stern heard the matter. She issued her Decision and Recommended Order on February 17, 2006, finding that the Employer had committed an unfair labor practice and, as a result, a free and fair election could not be conducted. The ALJ, therefore, recommended dismissal of the election petition. On February 24, 2006, MAP filed a petition for compulsory arbitration under Act 312, MCL 423.231 *et seq.* Inasmuch as no exceptions were filed to the ALJ's February 17, 2006 Decision and Recommended Order, this Commission issued an order on April 18, 2006, adopting the recommended order of the ALJ.

On July 7, 2006, Teamsters filed the representation petition in this matter. On July 18, 2006, MAP objected that this representation petition should be blocked by the February 24, 2006 filing under Act 312. The BER Director administratively dismissed the representation petition in this case on July 27, 2006, explaining that the Commission has a long-standing policy that "if the collective bargaining agreement has expired and an Act 312 arbitration proceeding is pending, the filing of a representation petition will be barred by the arbitration proceeding." On July 31, 2006, Teamsters objected to the dismissal of the representation petition, and on September 19, 2006, filed a brief in support of its contention that the aforementioned policy should not be applied to bar the representation petition in this case. Teamsters also filed a statement affirming that copies of the brief had been served upon MAP and the Employer, but neither party has filed a response to the brief.

Discussion:

The general policy as to when Act 312 arbitration will act as a bar to a representation petition was established on April 25, 1978, by the Commission's adoption of the following resolution:

The commission will entertain representation petitions during the established filing period of 150-90 days prior to the expiration date of a collective bargaining agreement even though Act 312 arbitration has been initiated or is pending but, if the collective bargaining agreement has expired and an Act 312 arbitration proceedings [sic] pending, the filing of a representation petition will be barred by the arbitration proceeding.

The policy was reaffirmed by motion made and carried at the Commission's November 14, 1980 meeting. On June 16, 1983, the Commission amended this policy by adding: "For

the purposes of this policy, an Act 312 petition shall be considered as pending from the date said petition is filed with the commission.”

A challenge to the validity of the policy was considered by the Court of Appeals in *Michigan Ass’n of Pub Employees v MERC*, 153 Mich App 536, (1986). There, Michigan Association of Public Employees (MAPE) filed a representation petition that was dismissed by the Commission because an Act 312 petition filed earlier by an incumbent union was pending. MAPE argued that the policy was invalid because it was never promulgated by a formal rule in accordance with the Administrative Procedures Act (APA) MCL 24.201 *et seq.* The Court of Appeals held, at 153 Mich App 546-547:

While there is some merit in MAPE’s argument that an administrative agency authorized to promulgate rules for enforcement of a statute must do so in accordance with the Administrative Procedures Act . . . and may not rely upon its own ad hoc policies not promulgated in accordance with the APA, this Court in *DAIIE v Comm’r of Ins*, 119 Mich App 113, 326 NW2d 444 (1982), *lv den* 417 Mich 1077 (1983), held that an administrative agency must be equipped to act either by general rule or by individual order as a matter of necessity, and that the agency need not promulgate rules covering every conceivable situation before the fact.

Thus, although the policy was not properly promulgated in accordance with the APA, the Court allowed its implementation.

Over the years, the Commission has permitted several exceptions to the policy. In *Oakland Co Sheriff*, 1980 MERC Lab Op 1123, the Commission found that a pending 312 petition did not bar an election petition where the unit in question was inappropriate under PERA because it contained both supervisors and non-supervisors. There, the Commission dismissed the Act 312 petition and ordered an election. In *City of Three Rivers*, 1985 MERC Lab Op 108, the Commission ordered an election despite the filing of Act 312 arbitration petitions because the requisite mediation had not taken place before they were filed. In *Berrien Co Sheriff*, 1999 MERC Lab Op 177, the Commission held that the Act 312 bar “does not by its terms apply to any petition for election filed during the 60-day open period.” In a footnote, the Commission also noted *Three Rivers*, “is no longer followed by the Commission, but instead Act 312 petitions filed prior to the completion of mediation are held in abeyance pending completion of the mediation process.”

In the instant case, the Teamsters filed its representation petition after the expiration of the Township’s collective bargaining agreement with MAP and after MAP’s Act 312 petition was filed. Based on the plain language of the Commission’s Act 312 policy, it appears that the bar should apply. However, a previous Teamster petition was held in abeyance during the pendency of an unfair labor practice proceeding and was dismissed when employer unfair labor practices were found to have occurred. In these circumstances, if the Act 312 bar is allowed to operate, unit employees will be deprived of the opportunity to vote on whether to choose a new bargaining agent during the pendency

of the Act 312 proceedings and for the three-year contract bar period that follows. The Teamsters argue that the lengthy period of time in which bargaining unit members would be prohibited from selecting their bargaining agent is in conflict with the purpose and policies of PERA. Notably, the Commission has refused to apply the Act 312 bar in situations where its application would be in conflict with the policies codified in PERA. See *Oakland Co Sheriff*, 1980 MERC Lab Op 1123.

In this case, the unfair labor practice proceedings have already prohibited the processing of a representation petition and prevented employees from voting to choose their representative for over a year. The fact that a representation petition has been barred by a previous finding of unfair labor practices persuades us that to bar a second petition because of a pending Act 312 arbitration would unduly restrict the right of unit employees to choose their bargaining representative. Consequently, we will order the reinstatement of the representation proceedings in this matter and will stay the Act 312 arbitration proceeding until the representation issue is resolved.

In reaching this decision, we have tried to evaluate the policy considerations that might have motivated the Commission's adoption of the Act 312 bar at its April 25, 1978 meeting. Unfortunately, no explanation or rationale was recorded in the minutes of that meeting. What we glean from the cases discussed is a concern for labor relations stability in police and fire fighting units. While we consider that concern to be significant, we also recognize that promoting stable labor relations by insulating incumbent unions from challenge by rival unions infringes upon the right guaranteed to public employees to negotiate or bargain collectively "through representatives of their own free choice."

It is the importance of that right that has persuaded this Commission to require an employer to cease bargaining and maintain strict neutrality with an incumbent union when a valid issue of representation has been properly framed. See *Paw Paw Pub Schs*, 1992 MERC Lab Op 375. Act 312 is an extension of the collective bargaining process, and the policy underlying the Act 312 bar to representation petitions contradicts the policy requiring employer neutrality in the face of a valid issue of representation. In an appropriate circumstance, this Commission may have to decide whether one of these conflicting policies must yield to the other.

Additionally, we observe that since its adoption in 1978, the Act 312 bar policy has led to a proliferation of Act 312 petition filings, many of which precede any negotiation or mediation and appear to be for the sole purpose of insulating incumbent unions from challenge. Only 25% of the Act 312 petitions filed result in the issuance of an arbitrator's award. This imposes a burden that is unrelated to this Commission's statutory responsibilities. Whether we should continue to accept this burden is a matter that deserves closer scrutiny.

ORDER

The Petition for Representation Proceedings filed by Teamsters Local 214 is hereby reinstated and shall be processed in accordance with the Commission's rules and procedures. Proceedings in the Act 312 arbitration between Brownstown Township and the Michigan Association of Police are stayed until the completion of the representation proceedings.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____