STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, MICHIGAN COUNCIL 25, LOCAL 101
Incumbent-Labor Organization,

-and- Case 20-L-1803-RC

MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEES,
Petitioner-Labor Organization,

-and-

WAYNE COUNTY,
Public Employer.

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APPEARANCES:

Miller, Cohen P.L.C., by Judith Champa and Jon Cakmakci, for the Incumbent-Labor Organization.

Michigan Association of Police, by Bryan Davis, for the Petitioner-Labor Organization.

Wayne County Corporate Counsel, by Bruce Campbell and Linda Pente, for the Public Employer

DECISION AND ORDER ON PETITION FOR ELECTION

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, a petition for a representation election was filed by the Michigan Association of Public Employees (MAPE) on December 7, 2020. The Petitioner seeks to represent a bargaining unit of all non-supervisory employees employed by Wayne County (Employer) and who are currently represented by the American Federation of State, County & Municipal Employees, Michigan Council 25, Local 101 (AFSCME).

AFSCME asserts the petition should be dismissed pursuant to Section 14 of PERA because a tentative agreement for a successor collective bargaining agreement had been reached between it and the Employer on the same day the rival petition was filed, and that such agreement constitutes a bar to an election. AFSCME further asserts that the tentative agreement was ratified

and executed within the requisite period under the "30-day rule" applied by the Commission in implementing Section 14.

Conversely, MAPE asserts that the election petition should be processed because AFSCME and the Employer had not reached a tentative agreement as of December 7, 2020. It further argues in the alternative, that even if a tentative agreement was reached on December 7, the tentative agreement was not duly enacted, adopted, and approved by the governing body of the Employer because the Wayne County Executive did not sign the collective bargaining agreement until after the expiration of the 30-day period. The Employer takes no position on the case.

A hearing was held before Administrative Law Judge David M. Peltz on April 8, 2021. For the reasons set forth below and following a thorough review of the record and briefs filed by the parties, we find that petition filed by MAPE is barred under Section 14 of PERA by the parties' tentative agreement, and further, that the tentative agreement was duly adopted and approved within the 30-day grace period recognized by the Commission. Accordingly, we dismiss the petition.

Facts:

The material facts are not in dispute. The Employer and AFSCME Local 101 were parties to a collective bargaining agreement covering a unit of non-supervisory employees who, by and large, work for the County's Department of Public Services. Although the agreement's original expiration date was September 30, 2018, the parties extended the agreement for an additional year to September 30, 2019. In June 2019, the parties began bargaining the terms of a successor agreement. Joseph Martinico was the lead spokesperson for the Employer. Richard Johnson was the chief spokesperson for Council 25 and Local 101, assisted by Local 101 Staff Representative Denis Martin.

The negotiations commenced in person but came to a halt in late March 2020 due to the COVID-19 global pandemic. As of that juncture, the parties had reached tentative agreements on the following contract provisions: Article 1- Agreement; Article 2- Purpose and Intent; Article 4, Aid to Other Unions; Article 5- Union Security; Article 6- Payment of Union Dues; Article 7- Payment of Service Charge; Article 9- Representation; Article 11-Disciplinary Procedure; Article 12- Special Conferences; Article 13- Strikes and Lockouts; Article 14- Civil Service Rules; Article 15-Probationary Employees; Article 16-Seniority; Article 17-Career Advancement, Job Security, and Operational Improvement; Article 17(a)- Filling of Vacancies; Article 18-Reclassification; Article 23-Temporary Assignments; Article 24-Vacation Leave; Article 27- Bereavement Leave; Article 31- Unemployment Insurance; Article 32-Union Bulletin Boards; Article 35- Severability Clause; Article 36-Tuition Reimbursement; Article 38-Deferred Compensation; Article 40- Errors in Wages, Leave Time, and Fringe Benefits; Article 41- Special Committees; Article 43- Supplemental Agreements; Article 44- Savings Clause; Article 45- Successor Clause; Article 46- Residency; Article 47- Snow and Ice Department of Public Service; and Article 48- Statutory Emergency Manager. The foregoing tentative agreements were initialed and dated by Martinico and Johnson typically during the bargaining session on the day they were reached.

Negotiations resumed in about April 2020 via telephone conference. As a consequence of the remote platform for bargaining, the manner of formalizing tentative agreements changed to some degree. Rather than both spokespersons signing simultaneously as had been the norm during the prior in-person negotiations, the parties instead exchanged the tentative agreements via email, with the party whose proposal was being adopted typically initiating the exchange by signing and dating the tentative agreement, scanning it into an electronic file, and emailing it to the spokesperson for the other party who would then, sign, date, scan, and return the document via email. This process resulted in frequent delays in formalizing a tentative agreement beyond the date of the bargaining session on which the tentative agreement had been reached.

Between the resumption of negotiations and December 4, 2020, the parties reached tentative agreements on the following thirteen additional contract provisions: Article 8-Management Rights; Article 10- Grievance Procedure; Article 20-Workweek; Article 21-Work Hours; Article 22-Overtime; Article 25-Sick Leave; Article 26-Leave Without Pay; Article 28-Holidays; Article 29-Insurance; Article 30-Retirement; Article 37-Indemnification; Article 42-Contracting & Subcontracting of Work; and Article 49-Termination.

Negotiations commenced on December 7, 2020 at about 10:30 a.m. As of that date, five items remained outstanding: Article 3-Recognition; Article 19- Layoff, Displacement & Recall; Article 33-Mileage Allowance; Article 34-Wage Adjustments; and Article 39-Uniforms. AFSCME presented its proposals on these outstanding items and the parties then caucused. When they reconvened at approximately 1:00 p.m. both parties verbally acknowledged that a tentative agreement had been reached on the remaining items. Johnson verified the existence of a tentative agreement by asking "is that everything that is outstanding?" to which Martinico replied in the affirmative. According to the testimony of Local 101 Staff Representative Martin, Martinico said "it looks like we have an agreement", to which the AFSCME bargaining team responded, "yes we do", and the parties thanked each other for their efforts. They then proceeded in short order to discuss the logistics of completing both the contract draft for the Wayne County Commission and a summary to distribute to the bargaining unit members for the ratification vote.

At approximately 12:36 p.m. that same day, MAPE had emailed the representation petition to the MERC election office. We take administrative notice that the MERC case information summary shows the petition as filed on December 7, 2020. The AFSCME witnesses testified that neither the Employer nor the AFSCME representatives were aware of the emailing of the petition to MERC and did not become aware of the filing of the petition until December 9. Neither the Employer nor MAPE offered any testimony refuting this assertion. The record is devoid of any evidence that the petition was served by MAPE on AFSCME Council 25, Local 101, or the Employer, via either email or hand delivery, on December 7.

With the exception of the article concerning the Mileage Allowance, Johnson initialed and dated all of the remaining tentative agreements on December 7 and emailed them to Martinico. Johnson was unable to initial the Mileage Allowance TA on that day because he had not yet received it from Martinico, who apparently needed to make some language adjustments to the written document, consistent with the parties' verbal agreement. The record is unclear as to the exact modifications that were made. Johnson also initialed a Memorandum of Agreement

concerning the Quality Control Committee on December 7, which remained unchanged from the prior agreement.

Later that afternoon, Martin called the Local Union president and advised him to notify all the Local 101 union stewards and the membership that the parties had reached a tentative agreement. That evening, Martin emailed his secretary, Debbie Talley, advising her of the parties' tentative agreement and requesting that she print ballots for a ratification vote scheduled for December 10.

On December 8, Martinico initialed and dated all of the tentative agreements forwarded by Johnson the previous day, and also returned the Mileage Allowance article to Johnson for his initials, which Johnson inserted that day. The following day, the Employer and AFSCME learned of the representation petition filed by MAPE when it was emailed to them by the MERC elections officer.

The Agreement was ratified by the bargaining unit on December 10, 2020 and signed by all AFSCME representatives and Martinico on December 15, 2020. The Quality Control MOA although not previously initialed by Martinico, was signed and dated by both parties on December 15, 2020 as part of the complete execution of the Agreement.

On December 17, 2020, a Resolution was adopted by the Wayne County Commission authorizing the collective bargaining agreement between Wayne County and AFSCME Council 25, Local 101, as recommended by the Chief Executive Officer, and further authorizing the execution of the collective bargaining agreement by the Chief Executive Officer on behalf of the Employer. Wayne County Executive Warren C. Evans signed the Agreement on February 5, 2020.

The Statutory Provisions and Applicable Legal Authority:

This case involves the balancing of two of the primary purposes underlying PERA: Fostering the stability of bargaining relationships to encourage the peaceful resolution of labor disputes and protecting the rights of employees to select the bargaining representative of their choice. In evaluating these respective interests as they arise under the facts of this case, we look to the statute, MERC's rules and regulations, and applicable case law.

The "contract bar" provision under Section 14(1) of PERA, MCL 423.214(1) states:

> . . . An election shall not be directed in any bargaining unit or subdivision of any bargaining unit if there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

Rule 141(3) of the General Rules and Regulations of the Employment Relations Commission, R 423.141(3), permits petitions for representation elections to be filed within the appropriate window period prior to the expiration of a contract. For petitions covering public employees who are not employees of a public school district or public educational institution, the

open window period for the filing of a petition, pursuant to Rule 141(3)(b), is "not sooner than 150 days and not later than 90 days before the expiration date of the agreement." The purpose of the window period is to "balance the sometime conflicting public interests in stability of bargaining relationships on the one hand and employee freedom of choice on the other hand." *Berrien County Sheriff*, 1999 MERC Lab Op 177, citing *Port Huron Area School Dist.*, 1966 MERC Lab Op 144, 149, and *City of Highland Park*, 1966 MERC Lab Op 173, 175. A rival union, or a decertification petitioner, can file a petition for representation election either after the contract expires or between ninety and 150 days before the contract's stated expiration date. *17th Judicial Circuit Court*, 29 MPER 43 (2015).

Prior to 1968, MERC (then the Labor Mediation Board) followed a general policy whereby collective bargaining agreements were found to be a Section 14 bar only if they had been "rendered legally enforceable by virtue of having been duly enacted, adopted or approved by the governing body, e.g. city council or commission, board of education, or county board of supervisors." *City of Grand Rapids*, 1968 MERC Lab Op 194 (1968). In the *City of Grand Rapids* case, the LMB recognized that inherent in its existing standard was the possibility of encouraging disruptive rival union activity during the period between a tentative agreement and the finalization of a legally enforceable agreement, in which dissident groups of employees would capitalize on the delay by filing a rival petition backed by the assertion that the rival union could "negotiate an even better contract".

In an effort to "[strike] a balance between employee freedom of choice and stability of existing bargaining relationships", the LMB announced a new policy to be applied in implementing Section 14 of the Act. It stated:

> A complete written collective bargaining agreement made between and executed by authorized representatives of a public employer and the exclusive bargaining agent of its employees will, for a period of up to thirty days thereafter, bar a rival union election petition or a decertification petition pending subsequent action on the agreement by the legislative body. A petition filed within the thirty-day period will not be dismissed if the legislative body meets and votes to reject the proposed agreement or takes no action within the thirty-day period. If the legislative body approves the collective bargaining agreement negotiated by its representative within the thirty-day period, the petition will be dismissed.

For purposes of applying the provisions of Section 14, the Commission has determined that the requirement for a "complete written collective bargaining agreement" is met by a written tentative agreement covering the language and provisions for the new agreement, which is adopted by the respective negotiators for the parties via signature or initials and dated.

In *Lake Superior State College*, 1984 MERC Lab Op 301, the representatives for the employer and incumbent union reached a tentative agreement for a new contract on July 12, 1983. The tentative agreement took the form of handwritten or typed corrections on each of the pages of the printed contract that had expired on June 30, 1983. Each page of the tentative agreement contained the initials of a representative for each of the parties and the operative date "7-12-83." The rival union filed its petition the following day, July 13, 1983. The tentative agreement was subsequently ratified by the membership on July 18, and by the Board of the college on July 28.

MERC determined that the parties had entered into a binding collective bargaining agreement on July 12 that was dated and initialed by both sides, so as to commence the 30-day period.

Conversely, in *Armada School District*, 1973 MERC Lab Op 221, the employer and incumbent union met to discuss the employer's draft proposal for a successor agreement on October 5, 1972. Following review, the incumbent union agreed with the employer's proposal with the exception of the wage rates and formula for computing vacation time. In response to the union's demands, the employer made certain concessions on the aforementioned two contract items. The changes were made in ink on the draft of the "agreement", but it was neither signed nor dated by either party. That same day, a representation petition was filed by a rival union. The employer and incumbent union then proceeded to secure the respective approval of the membership, through an informal poll, and ratification by the employer, but the final contract was never signed.

The employer asserted that a complete written contract had been entered into by the parties on October 5 in the absence of any knowledge of the filing of the rival petition, and that such contract constituted a bar to an election. The employer further asserted that the agreement was ratified by the Board of Education within the 30-day period required by *City of Grand Rapids.* MERC rejected the employer's argument and found that the agreement was not a bar to an election, stating:

> The difficulty with the Employer's argument is that the proposed contract was never properly executed since it was not signed by the respective representatives. Further, the contract was subject to ratification by the members of the bargaining unit in addition to the Employer's Board and could have been rejected by them. Such an incomplete agreement does not fall within the narrow exception permitted public employers under the Grand Rapids decision, which allows a public employer a 30-day period to convene its governing body in order to approve a complete written bargaining agreement that has been executed by authorized representatives of each party. . .Accordingly, we find that the contract with the Custodial Association is not a bar to an election in this case.

See also, *Kent County (Office Clerical Employees)*, 1971 MERC Lab Op 909 (tentative agreement reached by the parties, but not reduced to writing or signed, was not a bar to a petition filed the following day); *Mt. Morris Consolidated Schools*, 1990 MERC Lab Op 800 (purported tentative agreement was not a bar to an election where it had not been reduced to writing and the parties had not agreed on a benefit package, instead two options were presented to the membership for ratification.) c.f. *City of Dearborn (Ordinance Enforcement)*, 1990 MERC Lab Op 449 (two page document signed by both parties outlining the terms of the tentative agreement was a bar to an election.)

Since the *City of Grand Rapids* decision, the Commission has consistently applied the "30-day rule" in determining whether a rival representation petition or decertification petition should be processed, or properly dismissed as untimely. See, *Detroit Police Dept.*, 1970 MERC Lab. Op. 100 (contract not a bar under Section 14 where the petition was filed within the 30-day period following the parties' tentative agreement, but the agreement was not finalized until after the expiration of the 30-day period); *Chippewa County*, 18 MPER 83 (2005)(contract not a bar under

Section 14 where a tentative agreement was reached, but the employer suspended its vote on the adoption of the contract due to the filing of an intervening petition which resulted in the contract not having been finalized prior to the expiration of the 30-day period); *Rochester Community Schools*, 26 MPER 45 (2013)(tentative agreement reached on October 24, 2012 was not a bar to the processing of a rival petition filed on October 31, 2012 where the tentative agreement was rejected by the incumbent union's membership on November 1, 2012, and, consequently, the tentative agreement failed to be finalized prior to the expiration of the 30-day period).

Discussion and Conclusions of Law:

The two issues before us are whether the Employer and AFSCME reached a tentative agreement on the same day as the filing of MAPE's R case petition sufficient to trigger the 30-day grace period applied by the Commission to cases implicating Section 14 of the Act; and, if a tentative agreement was reached, whether the collective bargaining agreement was fully ratified and adopted by the parties prior to the expiration of the 30-day period.

We will address the latter issue first. In that regard, MAPE asserts that even assuming the parties reached a tentative agreement sufficient to start the 30-day period, the new collective bargaining agreement was not approved and signed by the Employer's authorized representative within the thirty-day period. In support of its claims, MAPE relies on fact that the Wayne County Chief Executive Officer did not sign the agreement until February 5, 2021, a date well outside of the 30-day period. We find this argument unpersuasive as a matter of both fact and law.

The agreement was ratified by the AFSCME membership on December 10 and signed by the bargaining representatives and bargaining teams for both parties on December 15, 2020. The Wayne County Board of Commissioners passed a resolution on December 17 which explicitly states that the Chief Executive Officer had recommended the approval of the agreement by the Board, and the agreement was implemented either simultaneously, or shortly thereafter. It is well-established that the signing or formal execution of a collective bargaining agreement is a mere formality or ministerial act. *City of Battle Creek*, 1994 MERC Lab Op 440; *City of Brighton*, 1990 MERC Lab Op 329. Accordingly, if a tentative agreement sufficient to trigger the 30-day period was reached on December 7, we find that the collective bargaining agreement was both ratified by the incumbent union membership, and approved by the employer's governing body, well within the 30-day period.

We turn now to the far more vexing question of whether the parties reached a tentative agreement on December 7 sufficient to insulate them from MAPE's rival petition for 30 days thereafter.

In the absence of any other considerations, the facts of this case would fall somewhere in between the cases discussed above. Unlike *Lake Superior State College*, and *City of Dearborn*, the parties here had not initialed and dated each and every tentatively agreed to provision. At the same time, this case is distinguishable from *Armada*, *Kent County,* and *Mount Morris*, where there was an absence of any signed tentative agreement. Here, the parties had reduced to writing, initialed, and dated, the vast majority of the provisions contained in the tentative agreement for their new contract.

More specifically, it is undisputed that as of December 6, 2020, after nearly 1.5 years of negotiations, the parties had reached written, signed tentative agreements on all but five articles of the new collective bargaining agreement. It is further undisputed that both parties fully acknowledged on December 7 that an agreement had been reached, and that AFSCME's lead negotiator initialed all but one of the remaining five provisions on December 7, further affirming that the parties had reached an agreement. However, it is also undisputed that the Employer's lead negotiator did not sign any of the remaining contract provisions until December 8, the day after MAPE's petition was filed, and further, that Article 33, covering the mileage allowance, was not signed by either of the parties' representatives until December 8.

If the parties had been negotiating under normal circumstances, through their traditional "face-to-face" bargaining medium, and we were to strictly apply the legal precedent discussed above, we would be inclined to find that the parties' tentative agreement was not sufficient to start the 30-day insulated period, and as such, was not a bar to an election. However, we believe that to render such a determination under the facts as they existed in this case would be to ignore the impact of unanticipated and uncontrollable circumstances wholly external to the parties' negotiations, but which bore directly on the manner in which negotiations proceeded following March 2020.

The parties' face-to-face negotiations became a casualty of a global pandemic which forced them, in late March 2020, to temporarily halt their bargaining meetings altogether. To their credit, they resumed negotiations in April, but were constrained to meet remotely via phone conference due to significant health-related concerns, and the state-wide restrictions imposed on in-person interactions as a result of the COVID-19 pandemic. If bargaining had not been halted in March, the parties may very well have concluded the tentative agreement prior to December 7. More importantly, however, if they were not forced to bargain remotely, it is well within reason that the tentative agreements reached on the remaining five items would have been initialed and dated by both parties on December 7. This assumption is supported by the testimony of Johnson who stated that when the parties had been bargaining face-to-face, "we'd sign them at the table, so you'd have them when you agreed to them". Johnson's testimony was not refuted by either MAPE or the Employer.

The fact that Johnson initialed and dated four of the remaining five contract provisions on December 7 demonstrates that the only reason for the delay in Martinico initialing those items was the fact that the documents needed to be scanned and emailed to him, an extra step caused by the impact of the pandemic rather than through any fault of the parties. Regarding the tentative agreement on Article 33, it is likewise reasonable to conclude that any necessary minor language changes which needed to be made by Martinico to render the written document consistent with the parties' verbal agreement, would have also been completed during the December 7 session if the parties had been meeting in person.

Further, had the parties been made aware of MAPE's petition on December 7, they may very well have endeavored to ensure that all of the remaining verbal tentative agreements were initialed and dated that day. But they were not aware of the filing of the petition and, consequently, simply followed the practice they had implemented upon the resumption of negotiations in April.

We do not consider dispositive the fact that the petition was technically filed approximately 30 minutes prior to the parties announcing their tentative agreement. The Commission has routinely admonished against encouraging "race-to-the-courthouse" conduct. *City of Detroit*, 23 MPER 94 (2010)("Rules or practices rewarding race-to-the-courthouse conduct should not be encouraged by the Commission, where a statutory goal is the promotion of voluntary good faith resolution of disputes by parties, rather than gamesmanship designed to secure a tactical advantage); *Kentwood Public Schools*, 17 MPER 67 (2004); *City of Pontiac*, 20 MPER 30 (2007). Although these cases involved Act 312 policies, we believe the same principal should be adhered to in matters arising under PERA, most particularly in the arena of contract bar.

Contrary to our dissenting colleague's assertion, we are not contending that in this case, MAPE "raced to the courthouse". However, in general, we believe that to find the specific time of filing a dispositive factor in determining whether a contract bar existed in cases where the rival or decertification petition was filed the same day as the parties reached a tentative agreement, would be to risk encouraging parties to engage in such conduct, which in our view does not foster the purposes and policies of PERA.

MAPE also asserts that the failure of the parties to initial and date the Memorandum of Agreement concerning the "quality control committee" militates against the finding of a tentative agreement on December 7 since that MOA was not signed by Johnson and Martinico until December 15, 2020. We disagree. First, the MOA remained unchanged from that contained in the prior agreement, so there were no changes that necessitated adoption by the parties. More importantly, however, we do not find that the unsigned MOA can reasonably be construed as an integral term of the collective bargaining agreement that would render a remaining complete tentative agreement insufficient to constitute a bar to an election.

While we are ever mindful of the admonition made by the Commission in *City of Detroit*, 23 MPER 94 (2010) to "tread with extraordinary care in making any policy choice which tilts the balance in favor of incumbent unions to the detriment of employee free choice", we believe that to ignore the extraordinary circumstances under which the Employer and AFSCME were constrained to conduct their negotiations, would be a dereliction of our statutory mandate to foster stability in existing bargaining relationships. Moreover, we believe that a finding of contract bar, while a deviation from strict application of existing precedent and our self-imposed 30-day rule, would not, under the facts of this case, have deprived the bargaining unit employees of their right to select a different bargaining representative.

Specifically, since the petition was filed prior to the ratification vote on the tentative agreement, the bargaining unit employees, if sufficiently disaffected from AFSCME, could have expressed their desire to choose a different bargaining representative by refusing to ratify the tentative agreement. Had that occurred, the tentative agreement would no longer have been a bar under the 30-day rule, and processing of the petition would have resumed and presumably advanced to an election. *Rochester Community Schools*, 26 MPER 45 (2013)(30-day rule does not apply to a second attempt "to negotiate a different agreement more acceptable to one or both of the parties" if the original tentative agreement is rejected by the union membership). But the bargaining unit employees did not reject the tentative agreement. Rather, they ratified it by a vote

of 97 to 57. Under these circumstances, we find it difficult to conclude that the free choice of the bargaining unit employees suffered any detriment.

Contrary to our dissenting colleague's assertion, we are not relying upon the ratification vote to support our finding of contract bar. Rather, we simply believe that under the extraordinary circumstances of this case, the balancing of rights between employees to choose their bargaining representative, and fostering the peaceful resolution of labor disputes, has not been tilted "in favor of incumbent unions to the detriment of employee free choice" because the bargaining unit employees had an alternate avenue by which to ensure that the contract would not be a bar and the processing of the representation petition would proceed.

The Commission has the authority to modify or even abandon a policy if necessary to best effectuate the Act. *City of Detroit*, 23 MPER 94 (2010); *Lansing Public Schools*, 1993 MERC Lab Op 18. We find that a modification of our 30-day policy is warranted under the extraordinary circumstances encountered by the parties during the global pandemic, and necessary to effectuate the purposes and policies of PERA to promote stability in bargaining relationships and the peaceful resolution of labor disputes. Accordingly, we find that the tentative agreement reached by the parties on December 7 was sufficient to start the 30-day period enunciated in *City of Grand Rapids*, and, as such, that the representation petition was barred under Section 14 of the Act.

ORDER DISMISSING PETITION

Based on the findings and conclusions set forth above, the petition for representation election filed by the Michigan Association of Public Employees in Case 20-L-1803-RC is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: June 8, 2021

Robert S. LaBrant, Commission Member, Dissenting.

Section 14 of PERA provides, in relevant part:

> (1) An election shall not be directed in any bargaining unit or subdivision of any bargaining unit if there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration.

In *City of Grand Rapids*, 1968 MERC Lab Op 194, the Labor Mediation Board (the Commission's predecessor) noted that, as a general rule, it will follow a policy of treating as a Section 14 bar only such agreements of public employers as have been rendered legally enforceable by virtue of having been duly enacted, adopted or approved by the competent governing body, e.g., city council or commission, board of education, or county board of supervisors. However, the Board recognized that the unavoidable delay, between tentative agreement by negotiators at the bargaining table and the convening of an official meeting of the legislative body, encouraged disruptive rival union activity and consequent raids if the tentative agreement does not serve to bar an election. This is so, the Board stated, because it encouraged dissident groups of employees to make capital out of their asserted ability to negotiate an even better contract. Such a situation, in the Board's view, discouraged reasonable settlements and responsible representation. Accordingly, in the interest of striking a balance between employee freedom of choice and stability of existing bargaining relationships, the Board announced the following policy which it would apply in implementing PERA Section 14 for all petitions filed after the date of the order in *City of Grand Rapids*:

> A complete written collective bargaining agreement made between and executed by authorized representatives of a public employer and the exclusive bargaining agent of its employees will, for a period of up to thirty days thereafter, bar a rival union election petition or a decertification petition pending subsequent action on the agreement by the legislative body. A petition filed within the thirty-day period will not be dismissed if the legislative body meets and votes to reject the proposed agreement or takes no action within the thirty-day period. If the legislative body approves the collective bargaining agreement negotiated by its representative within the thirty-day period, the petition will be dismissed.

In *Kent County (Office Clerical Employees)*, 1971 MERC Lab Op 909, bargaining on the contract between Kent County and the Kent County Employees Association began in July of 1970. An agreement was reached by the bargaining teams on noneconomic matters in December of 1970. Economic matters were agreed upon by the bargaining teams on February 22, 1971. The Board of Commissioners then considered the tentative agreement at an informal meeting held February 23, 1971 and the matter was then brought on for formal consideration on March 10, 1971, at which time the County Commissioners, by resolution, approved the agreement. The contract was signed in final form on March 17, 1971 by the representatives of the County and the Kent County Employees Association.

Although the County and the Association took the position that an agreement was reached by the County and the Association on February 23, 1971 and that such agreement acted as a bar to any petition for an election for a period up to thirty days, the Commission disagreed. The

Commission noted that, in allowing the thirty-day period, the purpose was to allow time for legislative bodies to function and either approve or reject the agreement. This is why, the Commission asserted, that it requires that the agreement, when reached by the bargaining representatives, be reduced to writing and signed. The tentative agreement must be complete and need only the approval of the legislative body. In *Kent County*, the Commission found that the record was devoid of any evidence that the tentative agreement reached on February 23 had either been reduced to writing or signed by the parties prior to the filing of the petitions on February 24, 1971. Under such circumstances, the Commission found that the contract that was approved by the Kent County Board of Commissioners on March 10, 1971 was not a bar to an election.

In *Armada School Dist*., 1973 MERC Lab Op 221, AFSCME filed a petition seeking to represent a unit of employees represented by the Armada Custodial Association (ACA) on October 5, 1972. The ACA and the school district had a collective bargaining agreement for the 1971-72 school year that continued in effect until July 1, 1972 or until a new agreement was reached. Although the Employer argued that there existed a collective bargaining agreement sufficient to bar an election when the AFSCME petition was filed, the Commission disagreed.

In *Armada,* the Employer maintained that a complete written contract was entered into on October 5, 1972 without knowledge of the filing of the petition for election and that this contract was ratified by the Board of Education within thirty days of October 5 as required by *City of Grand Rapids*, 1968 MERC Lab. Op. 194. The Commission, however, found that the proposed contract was never properly executed since it was not signed by the respective representatives. Furthermore, the contract was subject to ratification by the members of the bargaining unit in addition to the Employer's Board and could have been rejected by them. Consequently, the Commission held that such an incomplete agreement did not fall within the narrow exception permitted public employers under the *Grand Rapids* decision, "which allows a public employer a 30-day period to convene its governing body in order to approve a complete written bargaining agreement that has been executed by authorized representatives of each party."

In *Lake Superior State College*, 1984 MERC Lab Op 301, the Michigan Educational Support Personnel Association (MESPA), filed a petition for a certification election on July 13, 1983 and sought to represent a unit of office clerical, food service, and custodial-maintenance employees employed by Lake Superior State College. The bargaining unit was represented by AFSCME Local 1909 and the contract between Lake Superior State College and AFSCME expired on June 30, 1983. Bargaining between the Employer and AFSCME continued after the expiration of the collective bargaining agreement on June 30, 1983.

On July 12, 1983 representatives of the Employer and AFSCME reached a tentative agreement on a new contract. This tentative agreement was in the form of handwritten or typed corrections on each of the pages of the printed contract that expired on June 30, 1983. Each page of the tentative agreement contained the initials of a representative of each of the parties and the date of "7-12-83." It was understood by the parties that the tentative agreement would be ratified by the members of the AFSCME bargaining unit and by the employer's board of control before the contract would go into effect. On the day following the tentative agreement, July 13, 1983, MESPA filed its petition with the Commission. On July 18, 1983 the membership of AFSCME

ratified the tentative agreement. On July 28, 1983 the board of control of the College ratified the collective bargaining agreement.

Although MESPA argued that the *Grand Rapids* decision applied only to action by public employers and not to ratification action by the membership of the labor organization involved, the Commission disagreed and held that, with regard to the application of the *Grand Rapids* rule, absent a specific contract provision to the contrary, there was no reason to limit that rule only to ratification on the part of the employing entity. In this case, a contract was entered into by the parties and properly signed and dated on July 12, 1983, and the necessary ratification was only in the nature of "a condition subsequent, and not a condition precedent, to a valid agreement." The Commission noted that any other holding would render the 30-day grace period under the Grand Rapids decision a nullity, since the act of entering into a tentative agreement would as a practical matter have no meaning relative to the 30-day grace period.

Consequently, the Commission concluded that for contract bar purposes under Section 14 of PERA a tentative agreement entered into by a public employer and a labor organization, if complete and properly signed and dated, bars a rival petition for 30 days from the date of the tentative agreement, during which time the ratification process by both parties is taking place, unless it is clear from the tentative agreement that no contract is to come into existence until the ratification process is completed.

In *AFSCME Council 25 v. Chippewa County*, 21 MPER 1 (2007) (unpublished), the Michigan Court of Appeals reversed the Commission's decision in *Chippewa County*, 18 MPER 83 (2005). The court found that the Commission erred when it failed to enforce its 30-day rule. The Court noted that, under the Commission's decision in *Lake Superior*, where the parties have signed and dated a tentative agreement, ratification is a condition subsequent to a valid agreement and that the tentative agreement involved in the case was dated and initialed by representatives from each party. Consequently, for a period up to 30 days after negotiation of the tentative agreement, a rival union decertification petition was barred pending subsequent action on the tentative agreement by the legislative body. Under the circumstances involved in the case, the Court held that the Commission "erred by failing to enforce the 30-day contract bar in this case."

In *Rochester Community Schools*, 26 MPER 45 (2013), the Incumbent Union argued that, under the thirty-day rule, the employer and the incumbent had thirty days from the date of the tentative agreement to "perfect" their agreement. The Commission disagreed and noted that "…the thirty-day rule represents an attempt to balance the right of employees to seek a new bargaining agent with the need to prevent dissident minorities within a unit from upsetting an established collective bargaining relationship. As discussed above, the purpose of the thirty-day rule is to give an employer and union the opportunity to finalize an agreement made at the table by obtaining the approval of their governing body and membership. We conclude that the rule does not extend to negotiating a different agreement more acceptable to one or both of the parties."

In the present case, no complete written collective bargaining agreement made between and executed by authorized representatives of the County and the Incumbent Union (AFSCME) existed at the time the petition was filed. There is no dispute that the petition for election was filed

by MAPE approximately 30 minutes before the Incumbent Union and the County reached a verbal (oral) agreement on certain remaining issues. The County's chief negotiator did not affix his signature to the five newly agreed upon contract provisions until the day after the petition was filed. Additionally, the language of one of those agreements underwent modification before it was signed by both the County and Union representatives, Martinico and Johnson, on December 8, 2020. In view of these facts, there is no question that the December 7, 2020 alleged "tentative agreement" between the County and AFSCME would not serve as a bar to MAPE's petition. Any agreement reached on December 7 was not a "complete written collective bargaining agreement made between and executed by authorized representatives of a public employer and the exclusive bargaining agent of its employees." See *Kent County (Office Clerical Employees)* and *Armada School Dist*.

Stated differently, no preliminary resolutions of issues reached by the parties on December 7, 2020 constituted an agreement for which ratification would have been a condition subsequent. See *Lake Superior State College* and *AFSCME Council 25 v. Chippewa County*. Martinico did not put his signature on the four agreed upon provisions until December 8, 2020. Additionally, with respect to the remaining provision, neither Johnson nor Martinico affixed his signature to the provision until December 8 and Johnson testified that the delay was caused by the fact that the County wanted to revise the language agreed upon by the parties on December 7th and that AFSCME's bargaining team had to wait for a copy of the proposed change. At 5:15 p.m. on December 8, Martinico sent an email to Johnson in which he indicated that the County was working to get a draft of the completed successor agreement to the Incumbent Union within the next several days and that Martinico requested that Johnson return the draft "with revisions and signatures" by the close of business on December 10, 2020, so that the agreement could be presented to the County's Board of Commissioners at its upcoming meeting.

Although my colleagues appear to believe that, in the absence of the global COVID-19 pandemic, "the parties may very well have concluded the tentative agreement prior to December 7" and that this should be sufficient to start the 30-day insulated period on some unspecified date, and, as such, bar the petition and election, I must disagree. The Collective Bargaining Agreement in this case expired on September 30, 2019 and the parties began bargaining for a successor contract in June of 2019, long before the COVID-19 pandemic, and approximately a year and a half before the petition was filed. The inordinate amount of time taken to reach a tentative agreement was not therefore a result of the pandemic. Moreover, even if we assume that some delay could be attributed to the pandemic and that a tentative agreement would have been reached prior to December 7" (say on November 10, 2020 in view of my colleagues' reference to the temporary halt in negotiations in March and April 2020) would this tentative agreement have been ratified within 30 days? My predecessor Commissioners' insistence that a fixed starting date for the 30-day period be established by a "complete and properly signed and dated" agreement rather than by "parole evidence," speculation and conjecture is understandable. See *Lake Superior State College.* This aside, if we assume that some delay in negotiations should be attributed to the pandemic, is it not also reasonable and fair to assume that the pandemic delayed the process associated with filing the petition--communicating with employees and obtaining the necessary

authorization cards--such that the petition would have been filed prior to December 7 but for the pandemic?

While I recognize that Incumbent AFSCME put in great effort to negotiate the agreement it ultimately did after MAPE's petition was filed, I also recognize that AFSME knew the "rules of the game" when it decided to play the way it did and that MAPE followed Commission precedent when it filed its petition when it did. To penalize the latter and reward the former would be manifestly unjust. See *Macomb County v. Michigan Fraternal Order of Police Labor Council*, 33 MPER 37 (2019), affirming *Macomb County*, 32 MPER 20 (2018).

My colleagues also appear to accuse MAPE of engaging in "race-to-the-courthouse" conduct when it filed its petition on December 7 and on this basis argue that the petition should be barred. I must again disagree. MAPE did not engage in any conduct, in the present case, that could be accurately characterized as "race-to-the-courthouse" conduct. AFSCME's contract with the County expired on September 30, 2019 and MAPE could have filed a petition any time after that (as well as during the prior window period). Nonetheless, the petition was not filed until December 2020, more than 14 months after the contract's expiration. It may well be that a substantial percentage of the bargaining unit understandably grew dissatisfied as a result of working for so long without a new contract. Significantly, the Incumbent Union did not argue before the ALJ that MAPE engaged in "race -to-the-courthouse" conduct. Additionally, MAPE did not wait until after the negotiation of a tentative agreement to engage in "disruptive rival union activity" as a dissident group of employees "to make capital out of their asserted ability to negotiate an even better contract." The Commission's interest in *City of Grand Rapids* was not implicated here. Contrary to the majority, I believe that the only thing expedited in this case was AFSCME's ratification process (the tentative agreement was sent out for ratification on the same day it was signed).

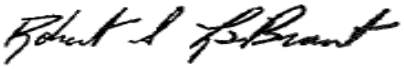
My colleagues also rely upon the fact that the tentative agreement reached by the County and AFSCME after the MAPE petition was filed was subsequently ratified by employees to reinforce their decision that MAPE's petition should be barred. I believe, however, that my colleagues' reliance is misplaced. The fact that a tentative agreement is subsequently ratified by employees, as was done in *AFSCME Council 25 v. Chippewa County*, is not relevant to and has never been used to determine whether a petition filed prior to the tentative agreement should be barred. Ratification votes are not subject to the same rules and are not held under the same conditions as a Commission election. Non-members of the Incumbent Union, for example, cannot vote in a ratification vote but may vote in a Commission representation election. Consequently, MAPE supporters who left AFSCME, as they had the right to do under Michigan's Right to Work Law, PA 349 of 2012, would not have been allowed to vote in the ratification but would have been allowed to vote in a Commission election. Significantly, according to AFSCME, in the present case only 154 ballots were cast out of a bargaining unit of 245 employees and 57 of these were votes against the contract. My colleagues' belief that MAPE supporters could have expressed their desire to choose a different bargaining representative by refusing to ratify the tentative agreement therefore is without basis. As a practical matter, I would also note that those employees who voted on the tentative agreement were not likely conversant with the Commission's 30-day rule but were unquestionably aware of the annual bonuses and $2000 retention stipend due, under Article 34, as

of the date the ratified agreement was approved. I also must note that if we allow subsequent employee ratification to be used to bar a timely petition, we will be encouraging the exact type of expedited ratification process and/or "race -to-the-courthouse" behavior that my colleagues seemingly want to avoid. See *City of Detroit*, 23 MPER 94 (2010).

Finally, and notwithstanding the above, I disagree with my colleagues' contention that the tentative agreement was ratified by the County within the 30-day period. There is no dispute that the Wayne County Chief Executive Officer did not sign the agreement until February 5, 2021, well outside the 30-day period. Under the Code of Ordinances of the County of Wayne, the Chief Executive Officer had the power to veto the agreement. Consequently, his signature was not a mere formality or ministerial act.

My colleagues deviate from longstanding precedent but have not cited any compelling reason that would require the Commission to do so. See *McCormick v Carrier*, 487 Mich 180, 211 (2010); *Wayne Co.*, 22 MPER 36 (2009); *City of Detroit*, 23 MPER 94 (2010); and *Macomb County*, 32 MPER 20 (2018). Consequently, I must dissent.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Robert S. LaBrant, Commission Member

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