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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BERRIEN COUNTY AND BERRIEN COUNTY SHERIFF,
Public Employers,

MERC Case No. R18 H-055

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Petitioner,

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Incumbent.
_____/

APPEARANCES:

Douglas Gutscher and Ed Jacques, for the Police Officers Association of Michigan

Michael J. Atkins, for the Police Officers Labor Council

DECISION AND DIRECTION OF ELECTION

On August 3, 2018, the Police Officers Association of Michigan filed a petition for representation election with the Michigan Employment Relations Commission (the Commission) pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212. Accordingly, the petition was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.[1] Based on the record of the evidentiary hearing held on October 9, 2018, on position statements filed prior to the hearing, and on a post-hearing brief filed by the Police Officers Labor Council on November 7, 2018, the Commission finds as follows.[2]

The Petition and Positions of the Parties:

Petitioner seeks an election in a unit consisting of all full-time nonsupervisory road patrol deputies, class officers, detective sergeants, road patrol sergeants, and all other

[1] MAHS Hearing Docket 18-018130
[2] Berrien County filed a position statement, but neither Berrien County nor the Berrien County Sheriff appeared at the hearing. Petitioner did not file a post-hearing brief.

employees of Berrien County and the Berrien County Sheriff eligible for arbitration under the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act, 1969 PA 312 (Act 312), as amended, MCL 423.231to 423.247, but excluding the sheriff, undersheriff, chief deputy sheriff, captains, lieutenants, part-time deputies, and all deputies and other Sheriff's Department employees not eligible for arbitration under Act 312. The employees that Petitioner seeks to represent are part of an existing unit represented by the Police Officers Labor Council (the Incumbent) that includes deputies in the Jail Division of the Sheriff's Department. These deputies are not required to be certified by the Michigan Commission on Law Enforcement Standards (MCOLES); all positions in the unit Petitioner seeks require MCOLES certification. The most recent collective bargaining agreement between the Employer and the Incumbent covering this unit expired on December 31, 2018.

The Employer and the Incumbent both oppose splitting the existing unit on the grounds that the Jail Division deputies, like the other positions in the unit, are Act 312-eligible. The Incumbent argues that the Commission has improperly applied the test for Act 312 eligibility set out in *Metropolitan Council 23, AFSCME v Oakland Co,* 409 Mich 299 (1980) to conclude that only law enforcement officers certified by MCOLES are Act 312-eligible. It argues that in this case the deputies in the Jail Division meet the test for Act 312 eligibility because they are (1) "policemen or subject to the hazards thereof;" (2) employees of a "critical service" police department, and (3) "critical service" employees, a strike by whom would threaten community safety. Petitioner states that while it agrees that the Jail Division deputies should be Act 312-eligible, Commission and Court rulings have established that they are not, and that its petition is therefore appropriate.

Findings of Fact:

The only witness at the hearing was Berrien County Undersheriff Charles Heit, called by the Incumbent. Heit and the Berrien County Sheriff, L. Paul Bailey, oversee the operations of the entire Berrien County Sheriff's Department (the Department). The Department is comprised of three divisions, Enforcement, Jail, and Emergency Management.[3] All positions within the Enforcement Division require MCOLES certification. Officers assigned to the Jail Division are not required to be MCOLES-certified, although some of them are. However, officers in all three divisions are deputized by the Sheriff, i.e. all officers swear the same oath to uphold the U.S. and Michigan Constitutions and to perform their duties faithfully which, according to the Incumbent, gives them the authority to make arrests and enforce the general laws of the State.[4] All deputized officers, whatever their division, undergo the same basic training by the Department, including training in firearms using the standard-issue duty weapon, defensive tactics, first aid, CPR, and blood-borne pathogens. All deputized officers are required to carry their duty weapons while on duty outside the secured areas of the jail. According to Heit, all deputized officers are authorized to carry their duty weapons while off-duty and the Employer prefers, but does not require, that they do so. Under the collective bargaining

[3] One captain, one sergeant, and one deputy are assigned to the Emergency Management Division. However, the record does indicate what these deputies do, whether their positions require MCOLES certification, or whether Petitioner seeks to exclude them from the unit covered by its petition.

[4] Neither Heit in his testimony, nor Incumbent in its brief, provided any statutory, constitutional, or case law support for this claim.

agreement between the Employer and the Incumbent, deputies and sergeants in all three divisions are paid on the same salary scale.

The Enforcement Division, which is headed by the Department's chief deputy, consists of road patrol, a detective bureau, and a narcotics unit. At the time of the hearing there were approximately sixty-eight full-time deputies and sergeants working in the Enforcement Division. The Employer is responsible for general patrol duties within Berrien County 24 hours per day, seven days per week. Per contract with these municipalities, the Employer also provides police services for Watervliet Township, New Buffalo Township, and Niles Township. Five deputies are regularly assigned to Watervliet, five to New Buffalo, and seven to Niles. The Department's detective bureau has five detectives who provide services to the entire County. In addition, a sergeant and four deputies are assigned to a narcotics unit that is under the supervision of a lieutenant from the Michigan State Police.

There are approximately seventy-five full-time deputies and sergeants assigned to the Jail Division. The Jail Division is headed by the jail administrator and is split into two sections, "jail operations" and "support services." Each section is headed by a lieutenant. Most Jail Division employees are assigned to jail operations, which, like general patrol, is a 24-hour, seven day per week operation. The minimum staffing level for the Employer's jail, which is established by the Michigan Department of Corrections (DOC), is nine. In addition to supervising inmates, keeping order in the jail, keeping contraband from entering the jail, and booking and releasing prisoners, jail operations deputies escort prisoners to court and to medical appointments. Jail operations deputies are also sometimes assigned to stay with an inmate at a hospital. Jail operations deputies are responsible for investigating assaults or crimes committed by inmates within the jail and following up during subsequent prosecutions. Within the secured areas of the jail, jail operations deputies are required to carry a taser and OC spray and wear a body camera. When on duty outside the confines of the jail, jail operations deputies must wear the same full duty belt, including a duty weapon, that deputies in the Enforcement Division wear.

In order to work in the jail, deputies are required to be certified by the DOC pursuant to the Local Corrections Officer Training Act, (LCOTA), MCL 791.531, within one year of their hire. To become and remain certified, jail operations deputies must receive four weeks of corrections training and participate in twenty hours of annual refresher training. In addition to the training required by the DOC, the Employer also requires newly-hired jail operations deputies to undergo twelve to fourteen weeks of field training to familiarize them with the specific operations of the jail. Section 13a of MCL 791.543a, however, allows a county sheriff to temporarily transfer an uncertified employee to a jail position normally requiring certification and to use uncertified individuals to function as corrections officers during an emergency.

The Employer maintains files of outside applicants for both Enforcement positions and Jail Division positions, although if an application is more than a year old, the applicant must file a new application. In hiring for Enforcement Division positions, the Employer gives preference to qualified applicants from the Jail Division. Heit testified that currently the Department does not have many waiting applicants for either Enforcement or Jail Division positions.

The Employer also employs part-time deputies, many of whom are retired from the Employer, who are not included in the bargaining unit. Per its collective bargaining agreement with the Incumbent, the Employer can use these part-time deputies to fill in for absent road patrol deputies in the townships but not for general road patrol. The Employer also uses its part-time deputies to fill in at the jail and in support positions within the Jail Division. Per contracts between the Employer and the County's Courts, part-time deputies employed by the Employer screen individuals entering the County's two courthouses and provide security at the courthouse doors.

After a deputy has worked in the jail for a period, the Employer usually offers to send them to a police academy to become MCOLES-certified. Many jail operations deputies eventually transfer to the Enforcement Division but keep their DOC certification. Assignment to certain jobs within the jail is sometimes used as a temporary light-duty assignment for an Enforcement Division deputy recuperating from an injury. At the time of the hearing, approximately half of the deputies in the Enforcement Division were both MCOLES-certified and certified by the DOC to work in the jail.

Support services deputies, like other deputies within the Jail Division, are not required to be MCOLES-certified. The quartermaster who oversees supplies for the entire Department is a support services sergeant. Full-time support services deputies provide security in the courtrooms at both county courthouses, and the Employer provides these deputies with training specific to that assignment. Two support services deputies are assigned full-time to transport inmates from the jail to state prisons or other jails and to pick up persons who have been arrested within the County and transport them to the jail. These two deputies, who spend most of their time on the road, also execute arrest warrants in certain sections of the County. The Employer has a contract with the Michigan Department of Health and Human Services (DHHS) for a full-time deputy to provide security at a DHHS office in the County; a support service deputy has this assignment.

Support services deputies in the court security, transport, and DHHS positions have all made arrests in the course of their assignments. Court security deputies effectuate arrests when someone with an arrest warrant, or someone who has violated his or her probation, appears in the courthouse. As noted above, the transport deputies regularly execute arrest warrants. The deputy assigned to the DHHS office has the authority to make an arrest if someone threatens a DHHS worker, which is a felony. As noted above, the Employer uses part-time deputies to fill in for absent support services deputies, but jail operations deputies may also fill in for them.

Heit testified that with the Sheriff's approval, deputized officers who are not MCOLES-certified are permitted to ride with certified road patrol deputies during their shifts and to participate fully in police activities while doing so. However, there was no explanation in the record of how often or under what circumstances this occurs. In addition, the Employer maintains four special teams that include both MCOLES-certified deputies from the Enforcement Division and deputies from the Jail Division who are not MCOLES-certified. These teams are a tactical response unit, a hazardous materials team, a bomb team, and a dive team. There is also a mobile field force unit that includes deputies from both divisions. Special

team and mobile field force unit deputies are called out from their regular assignments to perform special team duties when needed, but also attend regularly scheduled training with their team or unit. Vacancies on all the special teams are posted and are open to any sworn deputy. The Employer does not attempt to maintain a balance between certified and non-certified deputies on the special teams and does not require that any of the special teams have even one MCOLES-certified deputy. Heit testified that he believed that at one time the tactical response team was staffed solely by deputies without MCOLES certification, but that normally the special teams and mobile field force include both MCOLES-certified deputies and those who are not certified. That was the case on the date of the hearing. However, all but one member of the hazmat team, and more than half of the mobile field force, were not MCOLES-certified.

The tactical response team responds to high-risk situations, such as barricaded gunmen, within Berrien County and, pursuant to mutual aid agreements, within the two adjoining counties. It is also responsible for executing certain search warrants. The tactical response team is primarily staffed with Employer deputies, but there are employees from other police agencies on the team as well. On the average, the tactical response team spends about six hours per month executing search warrants and at least two days per month participating in regularly scheduled specialized training. The tactical response team regularly holds joint training sessions with security personnel at the nuclear power facility located in Berrien County. Tactical response deputies receive weapons training beyond that provided to other deputies, including training on fully-automatic firearms.

The hazmat team responds to hazardous material threats, for example an overturned tanker truck. The team consists of thirteen deputies; as noted above, only one of the current members of the team is MCOLES-certified. The Employer's hazmat team is one of fifteen regional teams in the State of Michigan and serves six counties in the southwestern part of the state. The hazmat team is deployed, on the average, between six and twelve times per year to assist local police and fire departments. The hazmat team also undergoes at least one day of regularly scheduled training every month.

The bomb and dive teams are Berrien County units but may respond to incidents in neighboring counties if the sheriffs there request their help. Neither of the two adjoining Michigan counties has deputies with bomb training. To be assigned to the bomb team, a deputy must first complete training provided by the federal government for law enforcement officers. By federal regulation, the bomb team must train at least two days per month. The bomb team sometimes participates with the tactical response unit in training exercises involving the nuclear power plant. On the average, the bomb team responds to between five and seven incidents per year. The dive team is part of the Department's marine unit; body recovery from bodies of water is one of the Department's statutory responsibilities. The dive team has one day of regularly scheduled specialized training per month. On the average, the dive team responds to between eight and twelve incidents per year.

The mobile field force is made up of four eight-member squads. As noted above, more than half of this force are non-MCOLES-certified Jail Division deputies. The purpose of the mobile field force is to respond to riots or other civil disturbances. Whenever the mobile field

force is deployed, the tactical response team responds as well. Deputies assigned to the mobile field force train annually but have not been called out for several years.

Berrien County Undersheriff Heit testified that the Department has no contingency plan in the event of a strike by Jail Division deputies because its collective bargaining agreement did not allow it to use Enforcement Division deputies to fill in for Jail Division deputies. Heit testified that, in any case, the jail could not be adequately staffed by deputies from the Enforcement Division in the event of a strike by jail operations deputies. He explained that while several road patrol deputies formerly worked in the jail, there are not enough road patrol deputies familiar with the jail's current operational methods to ensure the safety and security of the jail. Heit noted that an individual must be familiar with the software operating the security and booking systems in the jail to operate those systems. Heit testified that it would take between twelve and fourteen weeks to train someone to do what was needed to operate the jail. He stated that if, for example, a fire occurred when untrained individuals were manning the jail, the safety of the inmates might be jeopardized. Heit noted that while the Department might be able to rely on temporary assistance from other local law enforcement departments in patrolling the roads in the event of a strike by Enforcement Division deputies, the Department could not call on other departments for assistance in operating the jail. He also testified that in the event of a strike by Jail Division deputies, the Employer could not deploy its hazmat team, which could be a threat to public safety, and that if there was a civil disturbance the Department would do the best it could but might not be able to provide an adequate response without its full mobile response team. When asked about transferring inmates from the Employer's jail to jails in nearby counties, Heit admitted that the Employer sometimes transferred inmates to these jails when the Employer's jails were overcrowded. However, he stated that because these other county jails are so much smaller, they would not be able to take in all the inmates from the Employer's jail.

Discussion and Conclusions of Law:

Our policy is not to disturb existing units, even when we might have originally structured the unit differently. Only where the unit is per se inappropriate or an extreme divergence in community of interest is established, do we permit the breakup of an established unit. See *Ferris State Univ,* 2002 MERC Lab Op 263, 271; *CS Mott Cmty College*, 1980 MERC Lab Op 400, 412. In *City of Fenton*, 1984 MERC Lab Op 1086, we held for the first time that an extreme divergence in interest exists when Act 312-eligible employees are included in a bargaining unit with employees who are not Act 312-eligible. In *Fenton,* emergency dispatchers subject to Act 312 were included in a City-wide bargaining unit of nonsupervisory employees. Petitioner, who represented a unit of Act 312-eligible police officers employed by the City, filed a petition for an election to represent the dispatchers in a separate unit. We held that because of their Act 312 eligibility, the dispatchers should be allowed to vote on whether they wished to remain in their existing unit. We therefore directed a severance election in which the dispatchers voted on whether to be represented by the petitioner as part of its unit of police officers or to be represented by their current labor organization as part of its existing unit. In *City of Dearborn Heights*, 1984 MERC Lab Op 1079, we stated that "whenever possible," Act 312-eligible employees should be included in units with other Act 312 employees. Following *Fenton* and *Dearborn*, we directed elections in a series of cases in which emergency dispatchers

were permitted to vote to sever from their existing unit of employees who were not 312 eligible. See *City of Grand Rapids,* 1987 MERC Lab Op 193; *City of Walker,* 1991 MERC Lab Op 60; and *City of Centerline*, 1987 MERC Lab Op 500. In *Ingham Co Sheriff*, 16 MPER 71 (2003), we directed a severance election in which Act 312-eligible police officers were permitted to vote to be represented by the petitioner in a separate unit or to remain in their existing unit, represented by another labor organization, which also contained corrections officers.

Act 312 provides for compulsory arbitration for disputes, except contract interpretation disputes, involving certain employees in public police and fire departments. Although it is illegal for any public employee in Michigan to strike, the purpose of Act 312 is to further discourage such employees from striking by providing an alternate, expeditious, effective, and binding procedure for resolving disputes. Section 2(1) of Act 312, MCL 423.232(1)as amended defines a "public police or fire department employee" as any "any employee of a city, county, village, or township, or of any authority, district, board, or any other entity created in whole or in part by the authorization of 1 or more cities, counties, villages, or townships, whether created by statute, ordinance, contract, resolution, delegation, or any other mechanism, who is engaged as a police officer, or in fire fighting or subject to the hazards thereof; emergency medical service personnel employed by a public police or fire department; or an emergency telephone operator, but only if directly employed by a public police or fire department.."

The Incumbent Union argues that all deputies and sergeants employed by the Department are Act 312-eligible, and the Employer agrees. As noted above, according to the Incumbent, under the two-part test established by the Supreme Court in *Metropolitan Council 23 v Oakland Co Prosecutors Office*, 409 Mich 299 (1980), as interpreted by the Court of Appeals in *Capitol City Lodge No. 141 v Ingham Bd of Comm'rs*, 155 Mich App 116 (1986), deputies and sergeants in the Jail division are Act 312-eligible, because they are all: (1) police officers or subject to the hazards thereof; (2) employed in a "critical service" county department, and (3) "critical service" employees, a strike by whom would cause an imminent and serious threat to public safety. The Incumbent asserts that we erred when, in *Oakland Co & Oakland Co Sheriff*, 20 MPER 63 (2007), we held that the phrase "or subject to the hazards thereof" in Act 312 does not modify the phrase "engaged as policemen." More significantly for this case, it argues that we also erred by holding in that case that the only law enforcement officers eligible for Act 312 arbitration are those who are required to be MCOLES-certified. The Incumbent argues that this is too narrow a reading of the statute in that it automatically excludes sworn officers authorized by the Sheriff to enforce the general laws of the State but who are not required to be MCOLES-certified.

The issue in *Metropolitan Council 23* was whether the investigators employed by the Oakland County Prosecutor's Department were eligible for Act 312 arbitration. The investigators conducted investigations and did surveillance, often in cooperation with state and local police detectives, to assist the County Prosecutor in the prosecution of criminal activity. The Court noted that their function did not per se include the prevention of criminal activity at its inception. The investigators were required by their supervisor to carry a weapon and had used it on occasion. The investigators frequently made arrests, prepared arrest reports, and booked prisoners. Several investigators had suffered non-weapon related injuries in the course of their investigations. Reading the language of § 2(1) in light of Act 312's general purpose,

the *Metropolitan Council 23* Court announced a two-part test for determining Act 312 eligibility. It held, first, that the employee whose Act 312 eligibility was at issue must be subject to the hazards of police work; it was not enough that the interested department employer employed at least two persons in that capacity [other than the employee whose eligibility was at issue]. Second, the interested department employer must be "a critical-service county department engaging such complainant employees and having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety." Finding the Commission's conclusion that the investigators were subject to the hazards of police work to be supported by material and substantial evidence, the Court found that the investigators met the first part of this test. The justices joining the plurality opinion did not find it necessary to address whether the investigators were "policemen" within the meaning of Act 312. They concluded, however, that the Oakland County Prosecutor's Department was not a "critical-service" county department, a strike within which would likely impede the public safety, order, and welfare. They held, therefore, that the investigators were not Act 312-eligible. Two justices, Moody and Ryan, concurred separately. Justice Ryan wrote, "I am persuaded that the Oakland County Prosecuting Attorney's investigators are not 'employees engaged as policemen' whose strike would be likely to cause an imminent and serious threat to public safety and were not intended by the Legislature to be included within the provisions of 1969 PA 312." Justice Moody noted that while the investigators "might function in some way as policemen," he agreed that the Legislature did not intend to include them under the mantle of Act 312.

In *Bay Co & Sheriff*, 1985 MERC Lab Op 377, the Commission, applying the *Metropolitan Council 23* two-part test, held that correctional facility officers employed by the Bay County Sheriff's Department in its jail were Act 312-eligible. The corrections officers were responsible for the day-to-day control of sometimes violent prisoners, were required to search prisoners and visitors for weapons and contraband and on occasion disarm them, break up fights, and deal with behavior of disturbed prisoners. Some, but not all, corrections officers were also responsible for transporting prisoners outside the jail; only these corrections officers were required to carry a firearm. The undersheriff testified that in the case of a strike by the corrections officers, road patrol officers would be assigned to the jail, decreasing the availability of manpower for general police protection, that prisoners might be transferred to jails in neighboring counties and that the City of Bay City or the Michigan State Police might be asked to aid. The undersheriff stated that it would be difficult to staff the jail with replacements from outside the department. The Commission concluded that the corrections officers faced risks substantially like those of police officers and, because that they were employed by a "critical service police department," they were Act 312-eligible. It held that it was also clear from the record that the functions performed by the corrections officers were essential to the public safety, order, and welfare of the County and stated, "The Legislature clearly did not intend to limit the coverage of this act only to sworn and certified police officers." Finally, the Commission held that regardless of what arrangements might be made for employee replacement or transfer of prisoners in the event of a strike, a strike or unresolved labor dispute involving the corrections officers would clearly undermine the morale and efficient operation of the department.

In *Ingham Co & Sheriff*, 1985 MERC Lab Op 1175, the Commission relied upon *Bay Co* to find jail security officers in the Ingham County Sheriff's Department to be Act 312-eligible. The Ingham County jail security officers, who were not sworn and not required to be MCOLES-certified, performed essentially the same duties as the Bay County correction officers and, like them, were employed by a "critical service police department." In *Ingham*, the Employer introduced evidence that in the event of a strike among the jail security officers, road patrol deputies could be put into the jail for the purpose of maintaining security, although other Sheriff's Department activities would, therefore, have to be curtailed. The undersheriff also testified that substitutes for the jail security officers could be hired in the event of a strike. The Commission held, however, that the use of replacements would clearly undermine morale and the efficient operation of the department. The Commission held that because the jail security officers were critical service employees subject to the hazards of police work and employed by a critical service police department within the meaning of that statute, they were covered by Act 312. The Commission also opined that the hiring of replacements for striking corrections officers would undermine the morale and efficient operation of the department.

The Court of Appeals reversed the Commission's *Ingham Co* decision in *Capitol City Lodge No. 141 v Ingham Bd of Comm'rs*, 155 Mich App 116 (1986). The Court assumed, for purposes of the decision, that the jail security officers were subject to the hazards of a police officer. It held, however, that under both the plurality opinion in *Metropolitan Council 23* and Justice Ryan's concurrence, a finding that a strike by the employees at issue would threaten public safety was a prerequisite to Act 312 coverage. It noted that the Commission's decision had not specifically discussed whether a strike by the jail security officers would threaten public safety. The Court noted the testimony of the Ingham County Sheriff and undersheriff that the jail could be operated adequately if all the jail security officers went on strike by taking deputies and command officers from road patrol and other duties to man the jail, by transferring prisoners to other jails, and by hiring replacements for the striking jail security officers. The Court rejected the union's argument that replacing striking jail security officers with road patrol officers would threaten the safety of residents by diminishing the number of officers on road patrol or in other areas of the law enforcement, citing the rejection of a similar argument in *Lincoln Park Detention Officers v City of Lincoln Park*, 76 Mich App 358 (1977). The Court concluded that the record did not contain competent, material, and substantial evidence that a strike by the jail security officers would threaten community safety, and that, therefore Act 312 arbitration was not available to them.

Capitol City Lodge No. 141 was followed by a string of Commission decisions involving the Act 312 status of corrections officers employed by county sheriff departments in their jails. In each of these cases, the employer testified as to measures that it could take in the event of a strike by these corrections officers to maintain the jail at a level that did not threaten public safety. In addition to the measures suggested by the employer in *Capitol City Lodge No. 141*, i.e., replacing corrections officers with road patrol officers, transferring prisoners to other jails, and hiring replacements for the corrections officers, employers mentioned locking down the jail and eliminating certain inmate services, extending shifts, reassigning command officers normally assigned to administrative tasks to the jail, requesting court permission to release inmates serving misdemeanor sentences, using jail supervisory staff to train emergency replacements, and requesting assistance from the Michigan State Police and/or other local law

enforcement agencies. In each of these cases, we concluded that because of these measures, the corrections officers were not Act 312-eligible. See, e.g., *Mecosta Co*, 1989 MERC Lab Op 607; *Washtenaw Co & Sheriff*, 1990 MERC Lab Op 768; *Macomb Co*, 1991 MERC Lab Op 542 (union's argument that adequate replacements could not be hired because of the jail's large size rejected); *Allegan Co*, 1991 MERC Lab Op 583; *Saginaw Co*, 1992 MERC Lab Op 693; *Jackson Co*, 1994 MERC Lab Op 278; *Montcalm Co & Sheriff*, 1997 MERC Lab Op 157, aff'd sub nom *POAM v FOP*, 235 Mich App 580 (1999).

In *Tuscola Co & Sheriff*, 16 MPER 49 (2003), we addressed whether corrections corporals and a lieutenant/jail administrator who were included in a supervisory unit that also included road patrol and detective sergeants were Act 312-eligible. The lieutenant was a sworn deputy, required to be MCOLES-certified, and part of the Sheriff's Department chain of command. Because of his place in the chain of command, the lieutenant could theoretically be called upon to take command of the department in the absence of the Sheriff and Undersheriff, and both the lieutenant and the corrections corporals could be called upon to work outside the jail in an emergency. However, the regular responsibilities of both the lieutenant and the corrections corporals were in the jail. We stated that rather than relying on certification, the proper approach was to look at the actual duties involved to determine to what extent they include law enforcement or policing activities that made these employees "critical service employees" whose strike would threaten community safety. We held that the lieutenant/administrator, although required to be MCOLES-certified, was not Act 312-eligible because his actual duties were performed solely in the jail. We also held that the corrections corporals were not Act 312-eligible for the same reason. We rejected the union's argument that the corrections corporals were "dual function" employees because they could be involved in making arrests or capturing escaped prisoners because the corrections corporals did not perform these duties on a "daily," "regular," or "continual" basis.

In *Oakland Co & Oakland Co Sheriff*, 20 MPER 63 (2007), the union representing a bargaining unit of uniformed employees of the Oakland County Sheriff's Department filed a petition for Act 312 arbitration for this unit. The employer filed a motion seeking a Commission determination that employees in its Corrections Division, including officers assigned to the district and circuit court, and certain employees in its Investigative and Forensic Division were not covered by Act 312. The motion was referred to an ALJ for hearing, and the Commission issued a decision finding that Corrections Division employees, including those assigned to the courts, and forensic laboratory specialists and circuit court investigators in the Investigative and Forensic Division were not Act 312-eligible. Because of the unusual circumstances the case presented, we also ordered the bargaining unit split into separate units of Act 312-eligible employees and employees who were not Act 312-eligible. In making our determination as to Act 312 status, we concluded, based on the placement of the commas in Section 2(1) of Act 312 and research into the legislative history of that statute, that the phrase "subject to the hazards thereof" was intended by Act 312's drafters to modify only employees "engaged . . . in fire fighting," and not those "engaged as policemen." We held, therefore, that "non-police officer employees of a police department, or county sheriff department as here, are not within the scope of Act 312." Our discussion of this issue also included this sentence, "The phrase 'employees engaged as policemen' is straightforward and we conclude that in 1969, as today, it is best

understood as meaning only MCOLES-certified police officers who enforce the general criminal laws of the State."

Our reading of the phrase "subject to the hazards" thereof as not applying to police officers was a new interpretation of the statutory language. The Court of Appeals, in *Oakland Co v Oakland Co Deputy Sheriff's Ass'n*, 282 Mich App 266 (2009), upheld our findings on the Act 312 status of the challenged classifications, but found it unnecessary to address our new reading of the language. The Supreme Court, at 483 Mich 1133 (2009) also denied review of the Court of Appeals opinion without addressing this issue, although it vacated, as dictum, the portion of the Court of Appeals opinion stating that "it is well-established that county corrections officers and other employees who are not policemen are not subject to the hazards of police work." Thus, in neither *Oakland Co* nor any other case to date have the courts considered the new statutory interpretation advanced in that case.

As discussed above, the Incumbent argues that we erred in *Oakland Co* in holding that Act 312 does not cover law enforcement officers who are subject to the hazards of police officers but not required to be MCOLES-certified in their positions. However, while our reading of the statutory language in *Oakland Co* was new, our conclusion that individuals performing the duties of a corrections officer within a county jail are not within the intended scope of Act 312 was not new. As discussed above, from *Capitol City Lodge No. 141* onward, we have consistently found county corrections officers not to be "critical service" employees without considering whether they were subject to the hazards of policemen in their regular positions. These findings were based on testimony from many county sheriff's departments detailing the measures they could take to keep their jails operating without serious threat to the community if the corrections officers normally assigned there were to go on strike. In this case, unlike previous cases involving county corrections officers, the Employer has taken the position that its jail could not adequately function without its jail operations deputies. However, it is clear from the record that many of the measures discussed in the previous cases would also be available to the Employer here. In the event of a strike by the jail operations officers, the Employer could reassign Enforcement Division deputies to the jail; many Enforcement deputies worked in the jail at some time, even though they may not be trained to operate the current system. Even if unable to quickly hire replacements, the Employer could increase the hours of its part-time deputies. Also, there is no suggestion in the record that the Employer would be unable to extend the length of the shifts in the jail and eliminate some services normally provided to inmates. Moreover, while the Employer might not be able to transfer all its inmates to neighboring jails, it could reduce its jail population, and thus the number of deputies needed to operate it, by transferring some of these inmates to jails in other counties. As was suggested in some of the other cases, the Employer might also obtain the agreement of the courts to release certain inmates. We recognize, of course, that the Employer employs the number of jail operations deputies it does because it believes that they are needed to maintain safety and security within the jail. However, the issue relevant to their Act 312 status is whether a strike by the jail operations deputies would pose a serious and imminent risk to the community, not how and by whom the jail should be permanently operated. The status of jail operations deputies who are also assigned to special teams is discussed below. However, we conclude that jail operations deputies assigned solely to the jail, including those who supervise the transport

of inmates back and forth between the jail and the courts and to medical appointments, are not Act 312-eligible.

In this case, however, there are other deputies who are not required to be MCOLES-certified and whose Act 312 eligibility is in dispute. The first group consists of deputies within the Jail Division assigned to support services; none of these deputies regularly work in the jail. The second group consists of Jail Division deputies whose regular assignments are in the jail, but who are also assigned to special teams or to the mobile tactical force.

Using MCOLES certification as a touchstone for determining whether a law enforcement position is Act 312-eligible has enormous advantages. It allows the employers of law enforcement employees and the unions that represent them to quickly classify these employees as Act 312-eligible or not Act 312-eligible and forecloses disputes, when an Act 312 petition is filed, over Act 312 status.[5] However, as the Incumbent points out, *Oakland Co* did not provide a specific basis for its apparent holding that the only law enforcement employees who are eligible for Act 312, i.e., "engaged as policemen" within the meaning of Act 312, are those that are required to be MCOLES-certified. The Incumbent points out that the Jail Division employees whose Act 312 status is in dispute have all sworn an oath of office and have been deputized by the Sheriff. According to the Incumbent, as sworn deputies, all the officers in the Department have the power to effectuate arrests and enforce the general laws of the State. The record indicates that all the positions within the support services unit of the Jail Division have on occasion made arrests, and that the transport deputies routinely execute arrest warrants. According to the Incumbent, sheriffs had been deputizing individuals to effectuate arrests and enforce the general laws of the State for more than 100 years when Act 312 was enacted in 1969, and the fact that the Legislature did not, and has not, expressly excluded non-certified but sworn deputies from the Act's coverage indicates that the Legislature did not intend to limit Act 312 coverage to MCOLES-certified officers.

We agree with the Incumbent that the determination of whether a position is a "critical service" position ultimately depends on duties it performs and whether a strike by all the employees performing those duties would present a threat to the safety of the community. We find that while there is a benefit to having sworn deputies with arrest powers in the courts and in the DHHS offices, in the event of an emergency, such as a strike, these deputies could be replaced, if not by part-time deputies, by security personnel authorized to detain individuals until they can be arrested. We also find that the Michigan State Police, or other police agencies within the State, might be recruited to handle the duties of the two transport deputies if they were to go on strike, or these duties might be assigned to road patrol officers on a rotating basis. We conclude that none of the current support services positions are "critical service" positions because their duties could be adequately handled by others in the event that they engage in a strike.

None of the deputies assigned to the four special teams and mobile field force are assigned to these units full time, nor can their performance of their special unit duties be described as "daily" or "continual." The special teams, however, are regular assignments in

[5] However, as noted above, we held in *Tuscola Co* that a jail administrator/lieutenant who was required by the Employer to be MCOLES-certified but who worked almost exclusively in the jail was not Act 312-eligible.

that, in addition to responding when needed, the deputies are required to attend at least one day per month of regularly scheduled training. As described in the record, the duties of the tactical response team - responding to certain high-risk situations and executing certain search warrants – seem to us indistinguishable from regular police work. That is, the tactical response deputies are specially trained to handle certain types of particularly dangerous situations that police officers might normally, if not frequently, face. This seems also to be true of the mobile strike unit. It is not clear to us, and the Employer did not explain, why the Employer does not require the deputies on the tactical response team and the mobile response unit to be MCOLES-certified. If the mobile response unit and/or tactical response team were to be called out while the Jail Division deputies were on strike, these units might have to be supplemented with Enforcement Division deputies and might not perform as well as the specially trained and practiced teams the Employer currently has in place. We conclude, however, that these units could still perform their functions without serious threat to the public. Therefore, we find, the Jail Division deputies assigned to the tactical response team and mobile field force units are not critical service employees eligible for Act 312 arbitration.

The hazmat, dive, and bomb teams, however, present different issues. According to the record, all three of these teams have a mixture of Jail and Enforcement Division deputies, but the hazmat team has only one deputy from the Enforcement Division. It is not clear from the record whether these teams could function effectively in the absence of their Jail Division members. More importantly, the training that the deputies on these teams have, and the skills that their work requires, are clearly not possessed by the average police officer. Nor is it evident that replacements with the necessary skills could be found in the event of a strike by the Jail Division deputies. In addition, the record indicates that the Employer's hazmat and bomb teams are the only such teams within areas covering multiple counties. We find that the inability of the Employer's hazmat or bomb team to perform their functions, should an emergency requiring their services arise during a strike by Jail Division deputies, would pose a real threat to the safety and welfare of the community.

We question, however, whether in drafting Act 312, the Legislature intended to bring individuals performing the functions of the hazmat, bomb, and dive teams in this case within the purview of that statute. We note that while performing their specialized functions, these three teams are not actually engaged in "law enforcement" as they are not preventing or detecting crime or enforcing the general criminal laws of the State.[6] Nor, for that matter, are the special hazards to which these team members are exposed those normally encountered by police officers. As far as we can determine, while the duties of the bomb, hazmat, and dive teams require special training and skills, they do not have to be performed by law enforcement officers. Under these circumstances, and in the absence of any indication in the statutory language or legislative history to the contrary, we conclude that Jail Division deputies with assignments to the bomb, hazmat, and dive teams are not "critical service" employees within the scope of Act 312 by virtue of these assignments.

In accord with the findings of fact and conclusions of law above, we find that deputies in the Jail Division of the Berrien County Sheriff's Department, including both the jail

[6] The general definition of a "law enforcement officer" in Section 2(f)(i)(A) of the Michigan Commission on Law Enforcement Standards Act, MCL 28.602(2)(f)(i)(A)

operations unit and the support services unit, are not Act 312-eligible. We conclude, therefore, that the petition for an election to sever the Employer's Act 312-eligible employees from an existing unit represented by the Incumbent that also includes Jail Division deputies is appropriate, and we direct an election in the following unit.

ORDER DIRECTING ELECTION

We conclude that a question concerning representation exists within the meaning of Section 12 of PERA and we hereby direct an election among employees in the following bargaining unit which we find appropriate within the meaning of Section 13 of the Act:

> All full-time road patrol deputies, class officers, detective sergeants, road patrol sergeants, and all other nonsupervisory employees of Berrien County and the Berrien County Sheriff eligible for arbitration under the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act, 1969 PA 312, (Act 312), MCL 423.231 et seq, but excluding the sheriff, undersheriff, chief deputy sheriff, captains, lieutenants, part-time deputies, deputies and sergeants within the Jail Division, and all other Sheriff's Department employees not eligible for arbitration under Act 312.

Employees in the above unit may vote pursuant to the attached Direction of Election whether they wish to be represented by the Police Officers Association of Michigan in the unit above or to remain part of their existing unit, including Jail Division deputies, currently represented by the Police Officers Labor Council.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: APR 02 2019

DIRECTION OF ELECTION

IT IS HEREBY ORDERED THAT AN ELECTION BY SECRET BALLOT SHALL BE CONDUCTED AMONG THE EMPLOYEES WITHIN THE UNIT OR UNITS FOUND TO BE APPROPRIATE IN THE COMMISSION'S DECISION ON THIS MATTER. THE CHOICES ON THE BALLOTS SHALL BE AS SET FORTH IN THE COMMISSION'S DECISION.

ELIGIBLE TO VOTE ARE THOSE EMPLOYEES DESIGNATED IN THE ORDER DIRECTING ELECTION.

INELIGIBLE TO VOTE ARE EMPLOYEES WHO HAVE QUIT OR BEEN DISCHARGED FOR CAUSE, AND WHO HAVE NOT BEEN REHIRED OR REINSTATED BEFORE THE ELECTION DATE.

IT IS FURTHER ORDERED THAT THE EMPLOYER SHALL PREPARE AN ELIGIBILITY LIST IN ALPHABETICAL ORDER, CONTAINING ELIGIBLE VOTERS' NAMES AND ADDRESSES IN ACCORDANCE WITH THE ABOVE DESCRIPTION AND SUBMIT COPIES OF SUCH LIST FORTHWITH TO THE EMPLOYMENT RELATIONS COMMISSION AND TO THE OTHER PARTIES.

IT IS FURTHER ORDERED THAT THE ELECTION SHALL BE CONDUCTED BY MAIL BALLOT AT SUCH TIME AND DATE AS A COMMISSION AGENT SHALL DETERMINE.

IT IS FURTHER ORDERED THAT THE EMPLOYER SHALL CAUSE TO BE POSTED IN PROMINENT PLACES IN AND ABOUT THE PREMISES, SAMPLE BALLOTS AND NOTICES OF ELECTION (FURNISHED BY THE COMMISSION), SETTING FORTH THE TIME, DATE, AND PLACE OF THE ELECTION AT LEAST FIVE (5) DAYS PRIOR TO SAID ELECTION.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION