

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

In the Matter of:

CITY OF RICHMOND,
Public Employer,

MERC Case No. 22-C-0518-RC

-and-

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL,
Petitioner,

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Incumbent.

APPEARANCES:

Jon Moore, City Manager, for the Public Employer

Ed Jacques, POAM Director of Member Services, for the Incumbent

Cummings and Cummings, PLLC, by Heather Cummings, for the Petitioner

**DECISION AND ORDER ON CHALLENGE TO
TABULATION OF ELECTION RESULTS**

Pursuant to the provisions of §12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, a petition for Certification of Representative was filed on March 3, 2022, by the Michigan Fraternal Order of Police Labor Council (MFOPLC or Petitioner) with the Michigan Employment Relations Commission (MERC or Commission). The Petitioner sought to replace the Police Officers Association of Michigan (POAM or Incumbent) as the certified bargaining representative of a bargaining unit comprised of All Certified uniformed full-time, and part-time patrol officers of the Police Department employed by the City of Richmond (City or Employer).

The present dispute before the Commission involves a challenge by the Incumbent POAM to the decision of MERC's Elections Officer to spoil one of the returned ballots because the return envelope was not signed. This case was assigned for hearing to Michigan Office of Administrative Hearings and Rules (MOAHR) Administrative Law Judge Travis Calderwood, acting on behalf of the Commission.¹ Upon a review of the entire file, ALJ Calderwood determined that there were

¹ MOAHR Docket No. 22-018674-MERC

no issues of material fact requiring an evidentiary hearing. In an email dated June 27, 2022, ALJ Calderwood informed the parties of the same and also indicated that in his opinion, although the issue presented had not yet been addressed by the Commission, it had been long settled by the National Labor Relations Board (NLRB or Board). That email also provided the parties the opportunity to submit further position statements or briefs in this matter. On June 28, 2022, POAM General Counsel emailed a response to ALJ Calderwood's comments regarding the NLRB's treatment of the issue. The Employer and the Petitioner did not file anything further, thereby relying on their prior communications with the Elections Officer. Based upon the entire record before us, we find as follows:

Petition, Mail Election, Tabulation, and Objections:

As stated above, on March 3, 2022, the MFOPLC filed a petition seeking to replace the POAM as the certified bargaining agent representing the bargaining unit identified as:

All certified uniformed full time, and part time patrol officers of the Police Department, excluding the Superintendent or Chief, and any other command officers and all other City of Richmond employees.

Petitioner's filing estimated the approximate number of employees in the unit at twelve officers.

Following the filing of the petition, the MERC Elections Officer reached consent with the parties to conduct an election by mail in which the eligible voting members of the POAM bargaining unit could choose to be represented by POAM, MFOPLC, or no union. Pursuant to that agreement, the Elections Officer would mail ballots to all eligible voters on April 4, 2022, with the completed ballots to be received at the Commission Office no later than 5:00 p.m. on Friday, April 22, 2022.

On March 18, 2022, Richmond City Manager Jon Moore provided the Elections Officer with the names and addresses of thirteen bargaining unit members comprised of eight full time patrol officers and five part time patrol officers.

On April 4, 2022, thirteen ballots were mailed to the eligible voters as identified in the excelsior list provided by the City. Included within each mailing was a return envelope, a secret ballot envelope, the official ballot, notice of election and an instruction sheet titled, "MAIL BALLOT INSTRUCTIONS". Those instructions, reproduced in their entirety below, stated:

MAIL BALLOT INSTRUCTIONS

1. Mark your ballot. (**DO NOT SIGN** cut, tear, deface, mutilate or otherwise write on your ballot or it will be deemed as "spoiled" and not counted in the election.)
2. Insert ballot in the Secret Ballot Envelope.

3. Insert the Secret Ballot Envelope in the **Return Envelope** which provides for your **SIGNATURE. SIGN YOUR NAME** on this envelope. If you do not sign the outside of the return envelope, your ballot will be considered "spoiled" and not included in the election count. The line for the City is the City you reside in.
4. **YOU MUST PUT A STAMP ON THE RETURN ENVELOPE** and mail the envelope personally and individually. Remember, no one must handle your ballot but you, and ballots must be individually returned to MERC.
5. MAIL or hand deliver your completed ballot in sufficient time to arrive at MERC's Detroit Office on or before 5pm on the ballot return deadline date indicated in the enclosed Notice of Election.

Friday, April 22, 2022 at 5:00 PM.

NOTE: The counting procedures used by MERC assure the secrecy of your casted ballot. All secret ballot envelopes are removed from the return envelopes and placed together. Once compiled, the secret ballot envelopes are inter-mixed before removing and counting the individually casted ballots.

The front of the return envelope has the Commission's Detroit office address printed on one half and a box on the other side. That box contains the following two statements, "I BELIEVE I AM AN ELIGIBLE VOTER IN THIS ELECTION."; and "I PERSONALLY VOTED THE WITHIN BALLOT." Also located in that box are three spaces for the bargaining unit member to sign their name, indicate the city where they live, and identify their employer by name. The secret ballot envelope is slightly smaller than the return envelope and is clearly marked with the words "SECRET BALLOT" in large, bolded letters. There is no space on the secret ballot envelope directing the bargaining unit member to sign their name or write any other information.

As of the return deadline, the Elections Officer had received twelve return envelopes containing ballots. Of those twelve, eleven return envelopes had signatures on them, while the twelfth was unsigned. The twelfth envelope was date stamped as received by MERC staff on the deadline date of Friday, April 22, 2022. On Monday, April 25, 2022, the Election Officer conducted the official count of the ballots. Of the eleven ballots returned in signed envelopes, six voted for the Petitioner and five voted for the Incumbent. The Elections Officer deemed the twelfth ballot spoiled because the return envelope was not signed.

By letter dated April 27, 2022, and addressed to the Elections Officer, POAM Director of Member Services Ed Jacques objected to the tabulation and election results. The letter in stated:

Police Officers Association of Michigan, (POAM), objects to the tabulation in the above referenced election. A ballot that could be determinative was not counted because the outside envelope was not signed. It is obvious that this disenfranchised employee wants to participate in the process and took the time and effort to fill out and mail their ballot. This omission and subsequent spoiling of the ballot would not

have taken place if this were an on-site election, a choice MERC has discouraged since Covid-19.

As a free society we all encourage voters to participate in any process that impacts their lives. POAM insists that MERC open and review the contents of the envelope in question. If there is no signature associated with the ballot or the vote cast does not change the previous prevailing party, we will immediately withdraw this objection and concede the results.

Discussion and Conclusions of Law:

As it stands, the MFOPLC has won a majority of the votes cast thereby replacing the POAM as the unit's exclusive bargaining representative. Incumbent wants this Commission to order the opening of the unsigned return envelope to determine whether the enclosed secret ballot envelope is signed, and if so, to add that ballot to the tabulated results of April 25, 2022. If the twelfth ballot is opened, counted and the vote is for the POAM, neither union organization would have a majority of the votes cast which would require a re-run of the election. If the twelfth ballot is not opened, or if opened and the vote is for the MFOPLC, the MFOPLC remains the winner of the election.

Among the many rights guaranteed to public employees by Section 9 of PERA, is the right to bargain collectively with their public employers through representatives of their own free choice. MCL 423.219. Accordingly, the starting premise of any decision in a representation proceeding is the reaffirmation that the fundamental function of the adoption of PERA in 1965 was to recognize and codify the right of public employees to collectively designate an exclusive bargaining agent through whom their employer must deal with the workforce collectively, rather than individually. See *City of Detroit*, 23 MPER 94 (2010); MCL 423.209 & 423.211. PERA was enacted at the specific command of the people of Michigan, acting through their Constitutional Convention to adopt Const 1963, art 4, § 48. The statute was described by the Legislature as intended to "declare and protect the rights and privileges of public employees," with the fundamental Section 9 right being the right of employees to act through "representatives of their own free choice." The Commission is "the state agency specially empowered to protect employees' rights." *Ottawa Co v Jaklinski*, 423 Mich 1, 24 n10 (1985).

Rule 147(1) of our General Rules, 2014 AACS, R 423.147, requires that any election "shall be conducted under the supervision and direction of a designee of the Commission and shall be by secret ballot." Regarding the elections, we conduct two types-- on-site and mail ballot. Each election is conducted under the supervision of the MERC Elections Officer in accordance with our General Rules 147 through 149(b). The major distinction is with the on-site election, eligible voters cast ballots at the worksite during a designated voting period, while with the mail ballot election, eligible voters receive a ballot by mail which is completed and returned to the Commission office by a designated deadline date and time. The choice of election type used will depend on the specifics of each situation and pursuant to Rule 147 (4). We have long held that elections must be tailored to the specifics relevant to each individual petition. See *City of Detroit, R71 B-56 (1971)* (There is no single mechanical procedure that can be applied to all elections. Many elections must be custom-tailored to suit the various criteria and factors involved.)

In construing PERA, this Commission has been guided at times by the construction placed on analogous provisions of the National Labor Relations Act (NLRA). *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540 (1998); *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616 (1975). With regard to representation elections conducted by this Commission, we have adopted the NLRB's "laboratory conditions" standard, pursuant to which it is our obligation to provide an atmosphere in which an election can be conducted under "conditions as nearly ideal as possible" so that the uninhibited desires of the employees in the proposed bargaining unit may be determined. *Iosco Co Medical Care Facility*, 1999 MERC Lab Op 299; *Huron Co Medical Care Facility*, 1998 MERC Lab Op 670, 677.

While we are unable to determine with absolute certainty when we first held a mail ballot election, we can confidently state that our use of mail ballots goes back as far as 1970 under the Labor Mediation Act (LMA), 1939 PA 176, MCL 423.1 et seq., PERA's sister statute. See *Tom Davis Distributing Co*, 1974 MERC Lab Op 186, and 1971 under PERA, See *City of Detroit*, R71 B-56 (1971). The format of our return ballot and secret ballot system has remained constant and is the same used in this election.

We note that an ancillary issue in *Tom Davis Distributing Co*, dealt with a spoiled ballot. In describing that issue, the Commission stated:

The only other matter at issue was the disposition of a spoiled ballot. The election in this case was conducted by mail. One mail ballot was received without any identification on the outer mailing envelope as required by the procedures of this Commission. The election officer marked this ballot as a spoiled ballot and declined to include it in the tabulation. At the hearing both parties indicated their agreement to this disposition of this ballot.

In that case, but for the parties' agreement at that hearing regarding that spoiled ballot, we might have visited today's issue at that time instead of for the first time now, and after more than a half-century of conducting mail ballot elections.

The Incumbent is correct that neither PERA nor MERC's administrative rules contain the signature requirement under which our Elections Officer deemed the ballot at issue spoiled. In that same regard, we note that such an explicit requirement is also absent from the National Labor Relations Act, as well as the Board's administrative rules. Nonetheless, the Board has long required that employees sign the outer envelope for its mail ballot elections. See *Northwest Packing Co*, 65 NLRB 890, 891 (1946). The Board reasoned that the signature requirement was necessary to ensure that the ballot at issue could be identified as cast by an eligible voting employee. In fact, the Board will spoil ballots where an employee has printed their name as opposed to signing it on the envelope. See *Thompson Roofing Inc*, 291 NLRB 743 (1988).

The NLRB's Case Handling Manual also addresses the signature issue and states in Section 11336.5(c), citing *Thompson Roofing Inc*, that "Ballots that are returned in envelopes with no signatures or with names printed rather than signed should be voided." Section 11336.4(b) provides a potential remedy for unsigned ballot envelopes, stating "If a ballot envelope is returned

without signature, the election administrative professional should, if sufficient time remains before the deadline, send a duplicate kit with a letter explaining that failure to sign voids a returned ballot.”²


Here, we find no reason to deviate from our long-standing requirement in mail ballot elections that return ballot envelopes be signed. We believe the rationale set forth by the NLRB in this area is reasonable and appropriate in order to ensure the integrity of mail ballot elections. Accordingly, we uphold the decision of our Elections Officer and order that the twelfth ballot return envelope remain unopened. As such, we hereby certify the Michigan Fraternal Order of Police Labor Council as the exclusive bargaining agent for the bargaining unit comprised of all certified uniformed full and part time patrol officers employed by the Police Department of the City of Richmond.

ORDER

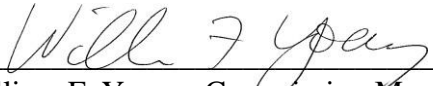
Based upon the above findings and conclusions, we hereby certify the Michigan Fraternal Order of Police Labor Council as the exclusive bargaining agent for the bargaining unit described as –

All certified uniformed full time, and part time patrol officers of the Police Department excluding the Superintendent or Chief, or any other command officers and all other City of Richmond employees.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Tinamarie Pappas, Commission Chair



William F. Young, Commission Member

Issued: August 9, 2022

² In the instant matter, the envelope in question was received on Friday, April 22, 2022, and the ballots were to be counted on April 25, 2022. Simply put, there was not near enough time for the Commission’s Elections Officer to ascertain whose ballot may have been at issue and then to send out a replacement and/or duplicate ballot.