

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

In the Matter of:

CITY OF NEW BALTIMORE,  
Public Employer,

MERC Case No. R18 D-036

-and-

MACDONALD PUBLIC LIBRARY,  
Interested Party,

-and-

NEW BALTIMORE PUBLIC EMPLOYEES ASSOCIATION,  
Labor Organization-Petitioner.

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**APPEARANCES:**

Berry Moorman, PC, by David M. Foy and Robert W. Morgan, for the Interested Party  
MacDonald Public Library

Ed Jacques, Director of Member Services, Technical, Professional and Officeworkers  
Association of Michigan, for the Petitioner

**DECISION AND DIRECTION OF ELECTION**

On April 28, 2018, the New Baltimore Public Employees Association filed a petition for a representation election with the Michigan Employment Relations Commission (Commission). Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, the petition was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.<sup>1</sup> Based on the record of the evidentiary hearing held on August 3, 2018, and on the arguments made by the parties in the position statements they filed before the hearing, the Commission finds as follows.<sup>2</sup>

**The Petition and Positions of the Parties:**

Petitioner seeks to represent a residual unit consisting of all full-time employees of the City of New Baltimore (Employer or the City) not covered by a collective bargaining agreement,

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<sup>1</sup> MAHS Hearing Docket No. 18-012884

<sup>2</sup> The City of New Baltimore did not appear at the hearing but did provide a brief position statement, as discussed below.

but excluding elected officials, supervisors, and public safety personnel. The positions covered by the petition, but not in dispute, consist of eight clerks with different job titles working in different departments and an assistant director of parks and recreation.

In dispute is whether three librarians employed at the MacDonald Public Library (the Library) should be included in the unit. The Library and the City maintain that the librarians should be excluded from the petitioned-for unit of City employees because the librarians are employed by the Library, not by the City. The Library also asserts that, even if the librarians are City employees, as professional employees they do not share a community of interest with the rest of the employees in the proposed unit.

Petitioner argues that even though the Library's operation is overseen by a board appointed by the City Council, the Library is functionally and organizationally a department of the City. It maintains that the librarians are either City employees or employed jointly by the City and the Library. In either case, Petitioner asserts, the librarians should be included in the broad unit of non-public safety employees that it seeks to represent.<sup>3</sup>

#### Findings of Fact:

#### History of the Library and Act 164

In 1941, the McDonald Public Library was established as a free public library under the City, Village and Township Libraries Act, Act 164 of 1877, MCL 397.201 et seq. Under Act 164, there are two ways a city may establish and fund a library.<sup>4</sup> One method is set out in Section 1(1) of the statute:

The city council of each incorporated city may establish and maintain a public library and reading room for the use and benefit of the inhabitants of the city. The city council may levy a tax of not to exceed 1 mill on the dollar annually on all the taxable property in the city. If approved by a majority of the voters voting on the proposal at the regular annual election, the city council may increase the tax levied by not to exceed 1 additional mill on the dollar annually on all the taxable property in the city. The tax shall be levied and collected in the same manner as other general taxes of the city and shall be deposited in a fund to be known as the "library fund."

For libraries established under Section 1(1), the mayor, with the approval of the city council, appoints a governing board of five, seven, or nine members for terms of not less than two years or more than five years. The city council has the power to remove a board member and the mayor and city council fill vacancies on the board by appointment.

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<sup>3</sup> Petitioner did not clearly indicate that it wished to represent library employees as a separate unit.

<sup>4</sup> As discussed below, in *Wixom Pub Library and City of Wixom*, 1985 MERC Lab Op 679, we found a library established under Section 1(1) of Act 164 to be a joint employer with the City of library employees and found that the clerical employees working in the library should be included in a unit of other City employees. In *City of Hazel Park, Library Board*, 1996 MERC Lab Op 287, we granted a unit clarification petition filed by a library established pursuant to Section 10a of Act 164 to remove three library employees from an existing unit of city employees on the basis that the library constituted a separate employer.

The election of officers and establishment of rules and bylaws by an Act 164 library board are covered in Section 5 of Act 164. This section also sets out the powers exercised by the board and provides, in relevant part:

The governing board has exclusive control of the expenditure of all money collected to the credit of the library fund, the construction of any library building, and the supervision, care, and custody of the grounds, rooms, or buildings constructed, leased, or set apart for that purpose. All money received for the library shall be deposited in the treasury of the city to the credit of the library fund, shall be kept separate and apart from other money of the city, and drawn upon by the proper officers of the city upon the properly authenticated vouchers of the library board. The governing board may purchase or lease grounds and occupy, lease, or erect an appropriate building or buildings for the use of the library; has the power to appoint a suitable librarian and necessary assistants and fix their compensation and remove appointees.

Section 7 of Act 164 requires a library board to submit an annual report to the city. The report is to include an accounting of the money received from the library fund and all other sources and how the money has been spent and for what purpose. The report also includes detailed information on the library's operations, including the number of books and periodicals on hand, the number reported missing, and the number of books loaned out. Section 8 gives a city council the power to pass ordinances imposing penalties upon persons committing injury to the library, including damage to its grounds and the failure to return books belonging to the library. Section 9 allows a library board to hold title to money, goods, or real estate donated to the library.

The second method by which an Act 164 library may be created and funded is set out in Section 10a. Under this method, fifty voters file a petition with the city clerk asking that a tax be levied for a library and specifying a rate of taxation not to exceed 2 mills. The tax petition may specify the number of years for which the tax may be levied, or the tax may be of unlimited duration. If a majority of voters in the next regular election vote for the tax, it is collected by the city as part of its regular tax collection and placed in a library fund.

When a library is created under Section 10a, the city council appoints an interim library board, but thereafter the board members are elected by the voters on a nonpartisan basis for staggered three or six year terms. Board members serve until a successor is elected or a board member resigns, dies, is convicted of a felony, ceases to be a qualified elector of the city, or is removed by the Governor of the State of Michigan. If a vacancy occurs during a board member's term, the remaining board members appoint an interim replacement.

Section 10a(3) states:

If the free public library is established under this section, and a governing board is elected and qualified as provided in Section 11, the board, on or before the first Monday in September each year, shall prepare an estimate of the amount of

money necessary for the support and maintenance of the free public library for the ensuing year, not to exceed 2 mills on the dollar of the taxable property of the city. Unless any period specified in the petition for the levy of the tax has expired, the governing board shall report the estimate to the legislative body of the city. The legislative body shall raise by tax upon the taxable property in the city the amount of the estimate in the same manner that other general taxes are raised in the city.

A city may also, under Act 164, contract with an adjacent city, township or village for the use of library services and, if approved by a majority of voters, levy a tax not to exceed 2 mills to pay for these services.

The only information that the Library or the City was able to uncover about the initial establishment of the MacDonald Library is contained in an excerpt from a document in the Library's historical collection entitled, "Skinner's History Stories of New Baltimore." According to this document, on June 23, 1941, the New Baltimore City Council, at the request of a group of citizens, adopted an ordinance establishing the Library as a department of the City. A month later, the City Council appointed a five-member library commission. The members of the commission had staggered terms, so that each year a member would be appointed, or reappointed, on the recommendation of the commission as approved by the Mayor and the City Council. The Library initially began operations in a space provided by the City in a City building, with donated books and magazines. A librarian and two library assistants were appointed, although it is unclear from the document by whom they were appointed or how they were paid. A year later, in July 1942, the City Council placed on the ballot for the next City election a proposal for a one mill levy to be used exclusively for library purposes. The proposal was adopted in the election held on November 3, 1942. From the historical document, it appears that the levy as approved was a permanent one mill tax. The library gradually grew and, in about 1952, the City bought a building solely for the Library's use. According to the historical document, the new building was remodeled, under the direction of the Library Commission, with funds from "penal fine money" which had been allocated to the Library's use for that purpose by the City Council. The document also notes that, in 1952, the Library was apparently still recognized as a department of the City.

The history of the Library set forth in the historical document ends in 1961 or 1962. In July 1987, according to an official City document, the Library Commission, then called the Library Board of Trustees, asked the City Council to put on the ballot for the next election a proposal to increase the library tax by one mill. On November 3, 1987, the City's voters adopted the proposal and, since that time, the City has collected two mills as part of its regular tax collections and placed these monies in a library fund used solely for library expenses. Insofar as the City has been able to determine, since the 1987 millage, the City has not allocated any additional funds for the Library for any purpose. Between 2009 and 2015, more than a million dollars in renovations were done to the Library building. The renovations were paid for by money from the library fund set aside over time by the Library Board. The Library Board arranged the preparation of specifications for the work and issued the bids. The Board President, after approval by the Board, signed the construction contracts. The invoices for the construction

work, like other Library expenses, were sent to the City Treasurer and automatically paid from the library fund. The Library also purchases all its own supplies and equipment.

### The Library's Current Operations

Robert Weins, a member of the Library Board for fifteen years and its current treasurer, was the sole witness at the hearing. Weins testified that it was his understanding that the Library was a Section 10a library under Act 164 because it is funded entirely from a perpetual millage and receives no funding from the City. He agreed, however, that the Library's Board members continue to be appointed by the City Council rather than elected.

As both Section 1(1) and Section 10a of Act 164 provide, the City collects the monies from the library millage and places it in a segregated library fund. The Library receives a small amount of aid from the State of Michigan and, like all libraries in Michigan, also receives a certain percentage of traffic fines. The Library has also applied for and received some grants, and it also obtains occasional donations. As indicated above, the City does not allocate money to the Library. All money received by the Library is deposited in the library fund. The Library Board receives a monthly report from the City Treasurer which shows how the fund's monies are invested and the amount of the accrued interest. The Library Board has control over how the money is invested and can direct the City Treasurer to change the investment allocations. The Library Board prepares an annual budget with its projected income from the library millage and other sources and its projected expenses. The Library Board submits its budget to the City, and the budget is included in the City's financial statements for audit purposes. Weins did not know if the City Council formally approves the Library budget or if the Library budget is incorporated into the City's annual budget. However, he testified that, during his tenure, the City Council has never altered a Library budget submitted to them by the Library Board. Other than its budget, the Library does not submit reports to the City regarding its operations.

The Library has an annual contract with the City pursuant to which, for a fee of \$15,000 per year, the City handles the payroll for the Library employees and other Library payables. The Library Board submits all invoices it receives directly to the City, and the City pays them from the library fund. The City also issues paychecks to library employees. Weins testified that the amount of the City's fee is negotiated between the City and the Library. According to Weins, the City typically presents the Library with an amount, and the Library and City agree on some lesser amount after Weins has shown the City what an outside company would charge.

Weins testified that twice in the past, including in 2017, the City attempted to charge the Library a portion of the overhead for City Hall operations. On both occasions, the Library Board presented the City's legal counsel with an explanation of the Library Board's statutory rights and responsibilities, and, on the advice of the City's legal counsel, the demand was dropped.

The Library Board appoints the Library Director, who is then responsible for hiring the rest of the staff. In addition to the librarians, who are all required to have a Master of Library Science degree, the library employs clerks and student pages. The clerks and the pages are all part-time employees. The Library Board at one time considered using the City's Department of Public Works to perform custodial services, but decided instead to hire an independent company

because it was cheaper. The Library Board also has contracts with landscaping and snow removal companies to care for the library grounds.

The Library Board establishes the salary scales for library employees and the cost of their salaries and benefits are included in the Library's budget. Full-time library employees are covered by the City's pension plan and participate in all its other benefit plans. According to Weins, the Library Board at one time considered purchasing its own healthcare plans, but concluded that remaining in the City's plans was more cost effective. The Library Director is evaluated by the Library Board, and the Director evaluates the librarians and other employees using an evaluation form developed by the Library Board itself. The Library maintains its own personnel files.

Regarding employees who work for the city, most of the clerks in the proposed unit work at City Hall, which is about three blocks away from the library building. The City also has a parks and recreation department building and a department of public services building, both of which are about a mile from the library building. The library building is open longer hours and closes on fewer holidays than City buildings.

Weins testified that he was unaware of any City ordinance pertaining to the Library's operations.

#### Discussion and Conclusions of Law:

The general characteristics of employers are (1) that they select and engage the employees; (2) that they pay the wages; (3) that they have the power of dismissal; and (4) that they have power and control over the employee's conduct. *AFSCME v St Clair Co*, 136 Mich App 721, 736 (1984), *aff'd in part, rev'd in part*, 425 Mich 204 (1986), quoting from *Wayne County Civil Service Comm v Wayne County Bd of Supervisors*, 22 Mich App 287, 294 (1970), *rev'd in part*, 384 Mich 363 (1971).

We have long recognized that the powers of an employer may be shared or exercised jointly by more than one entity. As mentioned in Footnote 4 above, we have twice before considered the question of whether a library established under Act 164 constituted a separate public employer. In *Wixom Pub Library and City of Wixom*, 1985 MERC Lab Op 679, the library at issue had been established in 1973 by the method set out in Section 1(1) of Act 164. The Wixom Library Board sought to remove a library clerk/administrative assistant from an existing bargaining unit of City employees. At the time of the hearing, one quarter mill was being levied on Wixom taxpayers, collected by the City, and put into a segregated library fund. The library fund was supplemented by funds appropriated by the City Council from the City's general fund. The Wixom Library Board consisted of five members appointed by the mayor with the approval of the City Council. In accordance with City ordinance, no more than one city council member could serve on the Board at a time. The City Council filled vacancies and had the power to remove Board members for misconduct or neglect of duty. The powers and obligations of the Wixom Library Board, as set out in our decision, were the same as those in the current version of Section 5 of Act 164 and included the power to appoint and remove librarians and assistants and fix their compensation. The Library prepared its own budget which it presented to the City Council for approval. The City Council could disapprove details of the

budget or reduce the Library's request for supplemental funds. However, the Library Board on occasion shifted money within the approved budget to cover items not approved by the City Council. As an example, the decision noted that on one occasion the Library requested a raise for the library clerk, but the City Council did not approve the full amount requested. The Library Board then gave the clerk a savings bond to supplement the raise.

In the *Wixom* case, we found that the Library Board and the City were joint employers of the library clerk/administrative assistant and rejected the Library Board's argument that she was employed solely by the Library. We stated:

...[W]e find that the Library Board is not a separate public employer under the provisions of PERA. While the Library Board retains under Act 164 a great deal of independence in regard to the management of the library fund and any other property donated to it, as well as in regard to the day-to-day operation of the library, it is still dependent on the City in many crucial aspects. The Council and mayor must appoint the Act 164 Library Board, unless the municipality agrees to have an elected board, and the City fills any vacancies on the Board. The City is responsible for collecting and retaining the funds of the Library, *supplementing such funds with its own appropriations, and passing ordinances affecting the operations of the Library. The Library must file an annual report with the City accounting for its utilization of funds, as well as the other details of running public library.* All disbursements are handled by the City upon the presentation of appropriate vouchers by the Library. Under these circumstances, similar to our findings in [*Wayne County Federated Library System*, 1979 MERC Lab Op 494, on remand from 402 Mich 871 (1978) and *Manistee County Library*, 1984 MERC Lab Op 736 <sup>5</sup>], we find that the Wixom Library Board is a joint employer with the City in regard to its employees, and is entitled to participate with the City in regard to any collective bargaining involving these employees if it so chooses. [Emphasis added].

In *City of Hazel Park, Library Board*, 1996 MERC Lab Op 287, as in *Wixom*, the Hazel Park Library Board filed a petition for unit clarification seeking to remove several positions from their existing bargaining units of employees of the City of Hazel Park on the basis that the Library, rather than the City, was their employer. The library in *Hazel Park* was initially established by resolution of the City Council and one mill was levied for a library fund. However, in August 1994, the City's electorate approved a proposal to convert the library to a library established by the voters and to replace the one mill library levy with a 1.8 mill levy for the library's exclusive use. In November 1994, the then-provisional Library Board members filed the unit clarification petition and agreed to recognize the collective bargaining agreements covering library employees on a temporary basis pending a decision on its petition. In July 1995, the City notified the Library Board members that henceforth the City would charge the Library for any services the City provided to the Library, including paying from the library fund invoices submitted by the Library Board and insuring and maintaining the library building. The Library Board then indicated that it would decide whether to use the City's services or contract with

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<sup>5</sup> See discussion of these cases below.

outside vendors. In November 1995, a Library Board elected by the voters replaced the provisional board. The elected Library Board then appointed a director to oversee the library on a day-to-day basis under the direction of the board and to supervise the library's assistant director and library clerk. We held that the Hazel Park Library Board, established under Section 10a of Act 164, functioned as an autonomous entity and constituted a separate public employer under PERA. We distinguished *Wixom* on the grounds that in *Hazel Park*, the mayor and city council had no control over the Library Board or the library's budget. We also found that Section 5 of Act 164 gave the Library Board broad powers which included hiring librarians and assistants and fixing their compensation, purchasing or leasing grounds for the use of the library, and the exclusive control of all monies collected to the credit of the library fund. Based on our conclusion that the Library was a separate entity, we granted the petition to exclude from the bargaining units of City employees the positions of library director, assistant director and clerical employee.

Here, the Library asserts that it is a hybrid of a Section 1(1) library and one established under Section 10a. That is, the Library was established by a resolution of the New Baltimore City Council rather than by petition. Its Board members are appointed and not elected and can be removed by the City Council. However, the Library receives its funding from a permanent millage. According to the Library, a city's voters must annually approve the millage for a Section 1(1) library. The Library argues that however it was established, it exercises sufficient independent control over its budget and its employees to be considered a separate employer.

*Wayne County Federated Library System*, 1976 MERC Lab Op 413, involved a library created by the Wayne County Board of Commissioners pursuant to 1917 PA 138, as amended, MCL 397.301 et seq. The library later became the Wayne County Federated Library System pursuant to 1965 PA 286, MCL 397.501 et seq. In *Wayne Co Library Board v Wayne Co Bd of Commissioners*, 78 Mich App 240 (1977), the Court of Appeals upheld our finding that the library board in that case, despite its separate source of funding and its day-to-day control over the library, was not the separate employer of library employees. Even though only five percent of the library's funding came from the County's general fund, the library's funds were appropriated by the county board of commissioners on a line-item basis, and the board of commissioners exercised significant control over the library's budget. Although the library board had the authority to select and dismiss library employees, library employees were part of the county's civil service system which determined their pay rates and classifications. The library also had to obtain the county's approval before filling a vacancy. The Court agreed with the Commission that due to the economic control exercised by the county over library employees, the library board was not their sole employer. The library board appealed the Court's decision, and the Michigan Supreme Court, at 402 Mich 871 (1978), remanded to us for reconsideration in light of the fact that 1965 PA 286 had been repealed and replaced by a new statute 1977 PA 89, MCL 397.551 et seq. On remand, at 1979 MERC Lab Op 494, we again rejected the library board's claim to be a separate employer, concluding instead that Wayne County and the Wayne County Library Board were joint employers. In *Manistee Co Library*, 1984 MERC Lab Op 736, we again rejected the claim of a library created pursuant to Act 138 of 1917 to be considered a separate employer.

In *St Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204 (1986), the Supreme Court recognized the concept of "co-employers" for collective bargaining purposes. One of the issues



in that case was whether the county prosecuting attorney was an employer of the county's assistant prosecuting attorneys and therefore had the right to participate in collective bargaining over the terms and conditions of their employment. The county, through its board of supervisors, had the authority to fix the number of assistant prosecuting attorneys and to determine their compensation. However, the prosecuting attorney, by statute, had the power to appoint, supervise, and dismiss them. Based on this distribution of authority, both the Court of Appeals and the Supreme Court concluded that the prosecuting attorney and the county were co-employers of assistant prosecuting attorneys and that both were, therefore, required to participate in collective bargaining for these employees.

The Library Board for the MacDonald Library is not elected by the voters. Ultimate control over the library is, therefore, exercised by the City Council through its right to appoint and remove Board members. However, unlike the city council in *Wixom*, the New Baltimore City Council does not exercise control over the library's budget. The Library is funded by a permanent two mill levy approved by voters, supplemented by donations and grants made directly to the Library. Additionally, unlike *Wixom*, the City does not supplement these funds with money from its own general fund. Nor has the City Council, at least during the fifteen year tenure of Library Board Treasurer Weins, interfered with the Board's budgetary decisions. The City processes the payroll for library employees and handles the payment of the Library's bills. However, the Library pays the City an annual fee for these services, the amount of which is negotiated between them. The Library Board sets the salaries and benefits provided to its employees and, except perhaps for its pension contribution, determines its own compensation costs. Moreover, the Library has, by statute, the authority to hire and dismiss its own employees. The record does not indicate that the City plays any role in the selection, evaluation, or discipline of library employees or that it exercises any control over their conduct. Based on these facts, we conclude that the control that the Library exercises over the wages and terms and conditions of employment of library employees qualifies it as a separate employer and that the City is not an employer of the library employees. Consequently, the librarians employed by the MacDonald Library may not properly be included in a bargaining unit of employees of the City of New Baltimore. Employees of the library may, should they choose to do so, file a petition with a separate showing of interest indicating the appropriate employer.

### **ORDER DIRECTING ELECTION**

We conclude that a question concerning representation exists within the meaning of Section 12 of PERA. Accordingly, 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 regular full-time employees of the City of New Baltimore not currently represented by a labor organization; but excluding elected officials, supervisors, and public safety personnel.

